Civil Law

Helmut Koziol (ed)

Basic Questions of Tort Law

from a Comparative Perspective

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ECTIL

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Foreword

This volume contains the English version of the second part of the »Basic Questions of Tort Law« project, which was financed by the Austrian Science Fund *(Fonds zur Förderung der wissenschaftlichen Forschung,* FWF). While the first volume »Basic Questions of Tort Law from a Germanic Perspective« (2012) discussed the basic questions from the perspective of German-speaking countries, this second volume provides the responses to these discussions from representatives of seven legal systems, as well as comparative conclusions. In selecting the seven legal systems, care was taken to ensure that the European legal families were represented; since the Eastern Members of the European Union, on the one hand, are not a unit in this sense and, on the other hand, offer the most recent codifications, two legal systems from this region were chosen. The USA supplies an influential source of ideas and its common law departs considerably from the common law found in Europe; therefore, it made sense to include it. Japanese law, in turn, is taken as an Asian counterweight, which in this case is of especial interest to Europe as it contains European ideas interwoven tightly with independent developments. The diversity of the legal systems selected provided a broad basis for comparative law discussions yet at the same time maintained a feasible range.

The national particularities are also reflected in the approach taken by the country reporters: the presentation and style of arguments are very different and this helps give the reader insights into the ideas behind the respective legal systems. Readiness to discuss the ideas presented in the first volume in detail is by no means uniform, thus also displaying cultural differences. Drafting the comparative conclusions was of course considerably more difficult given the great variety displayed by the country reports, but this undoubtedly made it much more interesting; it meant, however, that the individual legal systems were not always given the same degree of consideration. This inequality was, moreover, increased by the fact that not all reports could be analysed at the same time: some reports unfortunately arrived later than planned and due to the significant delays, work on the comparative conclusions had to begin before all of the country reports were delivered in order to keep the delay in completing the project within an acceptable timeframe.

In the comparative conclusions, I have tried to include ideas from the legal systems represented in the study and find starting points for the discussion on the further development of the legal systems and their harmonisation. In the final concluding remarks it was of course impossible to go into all the valuable

ideas presented in the country reports or indeed into all of the important basic questions. Thus, the selection of issues discussed in more detail may seem somewhat arbitrary; however, above all I tried to pick up on ideas that as yet have not been discussed very often and relate to basic questions – legal policy included. The country reports contain many more treasures, waiting to be discovered by comparative law scholars and theorists.

The ideas for discussion which I present are directed not only to those who work towards aligning laws, but also to legislators, courts and academics at national level, with the aim of promoting continued national developments and also a gradual convergence of legal systems from within. I am convinced that the comprehensive, thought-provoking country reports will also supply a rich source for the work of lawyers working in the field of comparative law.

It must be noted that this volume always refers to the English version of the »Basic Questions of Tort Law from a Germanic Perspective«, as this served as the basis for the project. I also want to emphasise that the comparative conclusions, despite their length, are of course by no means capable of reproducing the contents of the detailed country reports either fully or even adequately. In order to gain real insight into the individual legal systems and their framework of ideas, it is therefore imperative to read the country reports.

It was only possible to realise this project due to the help of many others. Thanks are due first to the Austrian Science Fund *(Fonds zur Förderung der wissenschaftlichen Forschung),* which provided the necessary funding. Then of course hearty thanks are due above all to the country reporters, who undertook so much to break into the rather foreign system of the German legal family and who frequently had to struggle with their already excessive workloads while writing their responses. I owe much gratitude to my staff at the European Centre of Tort and Insurance Law, Edina Busch-Tóth, Donna Stockenhuber, Kathrin Karner-Strobach and Vanessa Wilcox, for their reliable and dedicated handling of the project and the manuscript; Ms Vanessa Wilcox was also kind enough to produce the index. Special thanks also go to Ms Fiona Salter-Townshend for her competent translations of the Japanese report and the comparative conclusions. The publisher, Jan Sramek, and his team have once again executed the publication so intensively and professionally that it was a pleasure to work with them.

Vienna • Graz, April 2015 *Helmut Koziol*

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Chapter 1

Basic Questions of Tort Law from a French Perspective

Olivier Moréteau

Part 1 Introduction

I. The victim's own risk and shifting of the damage

The idea that everyone must bear his own general risk of life might appear in philosophical literature but not as the starting point of a commentary on French tort law. No French book dealing with tort law would start by saying that, in principle, the victim of damage must bear the consequences of it. Classical studies feature an actor-based approach: I am liable only when at fault, when having done something wrong or illicit (neminem laedere). *Planiol* started directly with fault (faute) and went on to cover cases of no-fault based liability. However, he also wrote: »Since fault is an act contrary to law (illicit) an important consequence results: if I have the right to do a given act, I am not at fault for having accomplished it; and if I have the right to abstain, I am not at fault for having omitted to do so. It follows that I owe nothing to anybody; no matter what damage any action or inaction may have caused to another«[1]. Simply turn this around and it is another way of saying that, as a rule, victims must bear their own losses. **1/1**

Koziol writes: »However, it is apparent that in today's society there is an increased perception – fuelled by certain unrealistic political ›land of milk and honey‹ delusions – that the individual can be cocooned away from all risks; that someone else is always responsible for any damage the individual suffers, and **1/2**

1 *M. Planiol,* Traité élémentaire de droit civil, vol II/1, for English translation see also Louisiana State Law Institute (1959) no 870, 476.

thus each victim's loss must always be covered. However, this overlooks the undeniable fact that compensation to the victim does not eliminate the damage from existence but merely passes it on to someone else, hence the damage is merely shifted and someone else suffers a loss by having to cover it«[2].

1/3 This is certainly true from a pure tort law perspective although, at the end of the day, much of the damage ultimately stays with the victim. However, when torts intersect with insurance and socialisation of risk, we may talk about shifting the cost of compensation, the damage remaining with the victim. The insured risk is diluted to be borne by all those insured, including the compensated victim. The same applies to social security with the socialisation of risks. As to the »land of milk and honey« delusion, the French are convinced that society works better when its members agree to share and equalise the burden of risk and adopt a solidarity model. This is a political choice that has proved sustainable at least in the past generation or two. Writing this does not involve condoning all excesses of French tort law, which will be pinpointed in the pages to come.

1/4 Contemporary ideas have developed the concept that bodily integrity and some other personal interests, such as property rights and personality rights, must be guaranteed. This victim-based approach[3] has pushed towards the development of strict liability, which invaded many areas of French law in the 20th century, for instance when the damage in question is caused by a thing or in case of road traffic accidents, to cite the most famous examples.

1/5 Meantime, the generalisation of universal social security coverage makes it possible for every victim of an accidental personal injury to access free or inexpensive medical care, not leaving a great deal of damage uncompensated. The fact that social security may recover against a tortfeasor is largely a matter of indifference to the victim, who receives minimal compensation anyway. Also, most belongings are protected by first-party insurance, third-party insurance, or a combination of both, recourse actions by insurance companies being invisible to the victim. To say that, as a rule, victims must bear their own losses is certainly true in tort law, but looking at things from the broader perspective of compensation of victims, it seems that in France the principle tends to become the exception.

1/6 Civil liability is not perceived as a restriction of liberty of action, France having largely moved from retributive justice to distributive justice. The self-proclaimed *pays des droits de l'homme* (country of human rights) has become a *pays des droits acquis* (a land of entitlements). It is widely accepted that a portion of insurance premiums feed compensation funds for victims of uninsured car drivers, insolvent

2 *H. Koziol,* Basic Questions of Tort Law from a Germanic Perspective I (2012) no 1/2.

3 *B. Starck,* Essai d'une théorie générale de la responsabilité civile considérée en sa double fonction de garantie et de peine privée (doctoral dissertation Paris 1947).

criminal offenders or terrorists, and that the compensation of victims of disasters is a matter of national solidarity[4].

Tort law is not seen as having the prevention of damage as its primary aim[5]. **1/7**
Though not denied to tort law, this preventive function tends to be associated with criminal law. The tightening of strict liability for road traffic accidents by the law of 1985 may result in the severely drunk pedestrian collapsing on the road being compensated by the careful driver (naturally at the expense of his insurance, meaning at all the expense of all likewise insured). However, speed limits are strictly enforced, driving under intoxication is severely punished, and road infrastructure has greatly improved, causing the number of fatalities and the damage caused by automobile accidents to drop dramatically, making French roads safer than they have ever been, in spite of ever-increasing traffic.

II. An insurance-based solution instead of liability law?

Universal insurance coverage does not necessarily induce carelessness. With the **1/8**
system of bonus-malus imposed by the Code des assurances, reckless drivers end up paying significantly higher premiums, whilst a careful driver with no accident liability on record may see his or her premium reduced by half. Flood victims may be compensated and yet the uninsured deductible will go up after every subsequent flood until local authorities adopt a prevention of risk plan, creating an incentive for residents to move to safer grounds or to pressure the local authorities to dredge the river or improve the levee system[6]. Similar rules exist to limit or exclude insurance coverage for those who build in special danger zones in case of technological disaster[7].

True, social security and insurance never cover the whole loss, but tort law only **1/9**
does this for the wealthy, who can afford to cushion their loss until they receive so-called full compensation, albeit at the cost of non-recoverable lawyers' fees[8].

4 *O. Moréteau,* Policing the Compensation of Victims of Catastrophes: Combining Solidarity and Self-Responsibility, in: W.H. van Boom/M. Faure (eds), Shifts in Compensation between Private and Public Systems (2007) nos 39 and 44.

5 See *A.-D. On,* Prevention and the Pillars of a Dynamic Theory of Civil Liability: A Comparative Study on Preventive Remedies (LL.M. Thesis, Louisiana State University, Baton Rouge, 2013).

6 *Moréteau* in: van Boom/Faure (eds), Shifts in Compensation between Private and Public Systems no 64.

7 *Idem* at no 63.

8 Art 700 Code of Civil Procedure allows litigants to request recovery of lawyer's fees, a matter which is then left to the court's discretion. The winner has a chance of recovering part of the fees, but France does not have a »loser-pays-all« system.

1/10 The French social security system may go broke, but there is no empirical evidence that this will be on account of accidents. It may instead be due to a combination of maladministration and soaring medical costs. As to the insurance industry, it remains a vibrant sector of French economic activity, strongly present and visible on the global scene, whilst premiums remain affordable for most users.

1/11 Nobody in France would dispute that fair compensation of damage must combine insurance and tort law solutions, and that mechanisms must be in place to avoid situations where victims have to wait months or years for the uncertain outcome of a law suit to receive compensation, at least in common cases of personal injury and damage to property. Regarding personal injury and damage to property, delay in mitigating the damage is more often caused by the financial inability of the victim to take reasonable steps in view of suitable and timely medical treatment or fixing or replacing the property. Not surprisingly, the doctrine of mitigation of damage flourishes in legal systems where social welfare is less developed. Though French scholars today consider it reasonable to introduce a mitigation of damage clause into the Civil Code[9], they tend to make a personal injury exception[10], which is not surprising given the existing solidarity system in place. From a law and economics perspective, affording victims immediate and full medical care is a way to mitigate the overall cost of accidents, which are in any case inevitable in any form of society and the costs of which tend to soar when proper care is not given at the right moment.

1/12 Observed from a purely tort law perspective, the French system may look unreasonable to many. These paragraphs try to project a holistic perspective, looking at the Basic Questions of Tort Law from the perspective of compensation[11]. The word compensation is a powerful term in the civil law tradition. It means the extinction of an obligation where two parties owe each other a similar amount of money. Insurance and social security mechanisms mean that people contribute a marginal amount of their resources to compensate or offset otherwise unbearable losses that might be covered as the outcome of a tort law suit but with a heavy cost, the time factor limiting their ability to mitigate damage. This preventive approach compensates or offsets (this term being used for the common law reader) the cost of damage, only leaving a marginal part that may be recovered at the cost of a law suit. From such a perspective, it is fair to allow the insurance industry or social security to recover by recourse action against any identified tortfeasor, as this mitigates the cost of the prevention system for all users.

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9 *O. Moréteau,* The Draft Reforms of French Tort Law in the Light of European Harmonization, in: P. Mangowski/W. Wurmnest (eds), Festschrift für Ulrich Magnus (2014) 77 ff, 88 f.

10 *Idem.*

11 Prof. *Viney* gives a masterful presentation of the general evolution in *G. Viney,* Introduction à la responsabilité[3] (Librairie générale de droit et de jurisprudence, LGDJ) (2008) (see Title I).

This means that from a French perspective, at least for practical purposes, civil liability is no longer a central but in fact a marginal mechanism. This should be borne in mind in any investigation of French tort law or comparative analysis. 1/13

III. Strict limits and rigid norms or fluid transitions and elastic rules?

In French law as in other legal systems, rigidity is not a term that could characterise civil liability. The view presented by *Koziol* that fault-based and strict liability are two ends of a spectrum with nuanced approaches in between[12] is certainly true of French law, where for instance the strict liability of the party having custody of the damaging thing will be apportioned based on the victim's fault. Likewise, though French law seems to adopt a strict rule of *non-cumul,* the boundaries between contract and tort liability are far from clear, despite a tendency to have the law of contract prevail wherever possible[13]. 1/14

Common law has inspired doctrines such as mitigation of damage and exemplary damages, which have slowly moved into French legal minds and the once sacrosanct norm that damages should fully compensate the victim, no more, no less, has given way to allow more flexibility[14]. 1/15

France never recognised absolutely protected and unprotected rights, as the Civil Code never came to define the protected interest. As a rule, under the French Civil Code[15] and provided that all other conditions for tort liability are satisfied, all damage is compensable whatever its kind, the concept of damage being historically a very fluid notion left to be defined by the courts. The French Civil Code does not distinguish between different heads of damage. This would have been 1/16

12 Basic Questions I, no 1/21.

13 Yet with a recent retreat to tort liability in the case of liability for medical malpractice: Cass Civ 1, 3 June 2010, Bulletin des arrêts de la Cour de cassation (Bull) I no 128, Recueil Dalloz (D) 2010, 1522 note *P. Sargos;* Revue Trimestrielle de Droit Civil (RTD Civ) 2010, 571, observations *P. Jourdain; O. Moréteau,* France, in: H. Koziol/B.C. Steininger (eds), European Tort Law 2010 (2011) 175, nos 4–10.

14 Recent proposals to reform the law of obligations or the law of torts make room for punitive or exemplary damages: art 1377 of the *Catala* draft *(O. Moréteau,* France, in: H. Koziol/B. C. Steininger [eds], European Tort Law 2005 [2006] 270, nos 1–11 and *H. Koziol/B.C. Steininger* [eds], European Tort Law 2006 [2008] 196, nos 1–8); art 54 of the *Terré* draft *(O Moréteau,* France, in: K. Oliphant/B.C. Steininger [eds], European Tort Law 2011 [2012] 216, nos 1–11 and *O. Moréteau/A.D. On,* France, in: K. Oliphant/B.C. Steininger [eds], European Tort Law 2012 [2013] 229, nos 1–17). See also *Moréteau* in: Magnus-FS 88.

15 Special laws may be more restrictive. See Law no 85-677 of 5 July 1985 aiming at the improvement of the conditions of road traffic accident victims and the acceleration of the compensation process.

contrary to *Portalis*' view that the Code should allow for social and technological evolution, placing great trust and confidence in the judiciary[16]. In this respect, though French law tends to be portrayed as a very positivist and legicentrist system, one should not forget that the driving force of the development of French tort law resides in a constant and intense dialogue between scholars and the judiciary. Unlike many other jurisdictions in Europe, French doctrine is not dogmatic but rather pragmatic. Academic writing may look formalistic at first sight, when one considers form and style. However, French (tort law) scholars tend on the whole to be quite informed, and they discuss economic and sociological implications of solutions, particularly in the case notes. A finger is sometimes pointed at the lack of interest the French have for »law and …« scholarship, particularly regarding law and economics and feminist studies. This may be because the French have done these things for a long time, and do not need to stick a label onto it. One should not confuse formalism and dogmatism. The French are formalist realists. They like their system to be open and to evolve according to ever changing social needs.

1/17 In its practice, French law is averse to all-or-nothing approaches and tends to make pragmatic use of its very few open-ended general Civil Code provisions. Apportioning based on comparative negligence is common practice in the courts, though this term is not used, especially where liability is based on the fact of a thing. When considering the victim's negligence in view of apportioning the strict liability of the party having custody of the thing causing the damage[17], judges cannot but also have in mind the negligence of the defendant, proving that in French court practice there is a de-facto grey zone between fault-based and so-called strict liability for the fact of a thing. Purists and dogmatists may be right in saying that in law the apportionment of liability should be an issue of causation and not of fault. However, looking at court practice, especially at a time when courts applied art 1384 to road accidents[18], in a case for example where the driver went through a red light at high speed and hit a distracted pedestrian crossing outside the protected area, the trial judge was likely to be more fault conscious than causation minded when reducing the compensation owed to the victim.

1/18 Likewise, the compensation for loss of a chance is a way of introducing proportional liability into French law[19]. When the actor's fault prevents the victim from concluding a promising contract, rather than deciding »the victim will be compensated for the full benefit expected« or »the victim shall get nothing be-

16 See exerpts of his Discours préliminaire du premier projet de Code civil, 1801, in *A. Levasseur,* Code Napoleon or Code Portalis? (1969) 43 Tulane Law Review (Tul L Rev) 762, 767–774.

17 Art 1384 para 1 Civil Code.

18 Namely in the fifty years preceding the adoption of the special law of 1985.

19 *O. Moréteau,* Causal Uncertainty and Proportional Liability in France, in: I. Gilead/M.D. Green/B.A. Koch (eds), Proportional Liability: Analytical and Comparative Perspectives (2013) no 2.

cause it is not proven that the actor's fault has caused the loss«, the victim can claim that the fault has caused the loss of a chance. The loss of a chance is seen as a head of damage[20], and compensation will be anywhere between 1 % and 99 % of what other systems would view as the full damage, wherever the claimant is presently and certainly deprived of a favourable opportunity[21].

1/19 Another test of the elasticity of rules is the high propensity of the French Court of Cassation, the highest Court in charge of preserving the Civil Code's integrity and securing the national unity of its interpretation, to declare that the extent of damage, the existence of negligence, the amount of negligence by the victim and its causal role, etc, are questions of fact left up to the free assessment or discretion of the lower courts. What appears to be a question of law in other jurisdictions may be described as a question of fact, restricting the ambit of the Court of Cassation's power of review. Self-restraint and deference help control the floodgates, in a system where all litigants are allowed to challenge the legality of any final judgment in the Court of Cassation. The highest Court shows great mastery at self-defining the ambit of its review power. At times it restricts its control (and limits the flow of cases, a matter of survival) by stretching the notion of fact and therefore limiting the questions of law to be subjected to its review. When it identifies shortcomings of self-restraint, it easily stretches its review powers by reminding lower courts that, after all, it has jurisdiction to examine what it calls *dénaturation,* which means wrongful legal characterisation of the facts. These processes of disguised discretion have fascinated comparatists like *Mario Rotondi*[22]. This is totally undogmatic, it allows for greater flexibility and fluidity, without a need to change the law. The French are masterful at steering their apparently rigid system in subtle and not visible ways. Judges and scholars have no interest in disclosing overly effective powers; this allows them to operate backstage, without being caught in the eye of politics. This is the heritage of having developed in a rigid system: loopholes have to be identified and the limits of rigidity are constantly tested to allow for greater flexibility. Be subtle, do not get caught, especially if you are trying to give an effective response to a basic question of tort law!

20 This is easily done as the Civil Code does not define heads of damage.

21 Cass Civ 1, 4 June 2007, La semaine juridique: Juris Classeur Périodique (JCP) 2007, I, 185, observations *P. Stoffel-Munck,* commented on by *O. Moréteau,* France, in: H. Koziol/B.C. Steininger (eds), European Tort Law 2007 (2008) 274, no 8 ff.

22 *M. Rotondi,* Considérations en fait et en droit, RTD Civ 1977, 3.

Part 2 The law of damages within the system for the protection of rights and legal interests

I. In general

1/20 There is no phrase in France that is equivalent to »Schadenersatzrecht« or law of damages. It is quite uncommon in French scholarship to look at things in the way they are combined in this chapter. This is not to say that French law has nothing to say on compensation of damage. For instance, a well-known book addresses »Droit du dommage corporel, Systèmes d'indemnisation«[23], and not surprisingly crosses the line separating tort law from insurance law and other disciplines, but with a focus on bodily injury. Recent developments show that the French are also exploring the possibility of expanding compensation towards disgorgement of illicit benefits in proposing that exemplary damages may be legitimate. However, inroads in the direction of disgorgement[24] or punishment[25] should not be too distractive. The function of damages under French law remains primarily compensatory.

1/21 The following paragraphs will consider damages in relation to other remedies available in the case of undue interference with rights and legal interests, trying to follow the reverse engineering process *Koziol* invites us to engage in, which seems to take us from the situation where compensation (lato sensu, as he also covers claims in restitution) seems due without many prerequisites to cases where compensation may be available but subject to more stringent conditions.

II. Claims for recovery

1/22 As in other systems, restitution or »recovery«, as it is called by *Koziol*[26], allows the claimant to recover things or monies that he is entitled to when the defendant is not allowed to hold on to such things or monies. Under French law, this covers

23 *Y. Lambert-Faivre/S. Porchy-Simon,* Droit du dommage corporel, Systèmes d'indemnisation[7] (2012).

24 *F. Terré* (ed), Pour une réforme du droit de la responsabilité civile (2011) 199–201, discussing draft art 54; Avant-projet de réforme du droit des obligations et du droit de la prescription, 22 September 2005, draft art 1371.

25 See the problematic recognition by French courts of foreign judgments granting punitive damages.

26 Basic Questions I, no 2/6.

restoration of a payment not owed (répétition de l'indu)[27] and enrichment without cause (enrichissement sans cause), traditionally ranged in the category of »quasi contracts« and therefore part of the law of obligations[28]. Most claims for recovery intersect with the law of property (droit des biens) in those cases where people are illegitimately deprived of things they own or of the fruit thereof (revendication). When such things have been damaged or destroyed, money compensation will be paid instead.

III. Preventive injunctions

According to art 808 of the Code of Civil Procedure: »In any case of urgency, the president of the Tribunal de grande instance may order by way of *référé* any measure that does not raise any serious objection or that may be justified by the existence of a dispute.« **1/23**

Article 809 also provides that: »The president may always, even in the case of a serious dispute, order by way of *référé* any necessary protective or restorative measures, either to prevent an imminent damage or to stop an obviously unlawful disorder. In cases where the existence of the obligation may not be seriously disputed, he may award an interim payment to the creditor or order the performance of the obligation even when it is an obligation to do.« **1/24**

These provisions are frequently used in the context of media law, to prevent defamation or any infringement of rights of privacy, or rights people have to their image[29]. These rights are protected by art 9 of the Civil Code, also making provision for preventive injunctions: »Everyone has a right to respect for his privacy. Judges may, without prejudice to reparation for damage suffered, prescribe any measures, such as sequestration, seizure and others, proper to prevent or terminate an attack on the intimacy of private life; such measures may, in case of urgency, be ordered by *référé*«. **1/25**

This does not mean that preventive injunctions are exclusively used for the prevention of primarily non-pecuniary damage. They may also be granted in the case of other torts. For instance, they are frequently used in cases of nuisance, a tort causing a mix of economic loss and non-pecuniary damage[30]. However, few tort scholars make reference to prevention and preventive injunctions when dis- **1/26**

27 Art 1376 Civil Code.

28 *M. Fabre-Magnan,* Droit des obligations, Responsabilité civile et quasi-contrats[2] (2010) 1–3, 433.

29 *K. Anterion/O. Moréteau,* The Protection of Personality Rights against Invasions by Mass Media in France, in: H. Koziol/A. Warzilek (eds), The Protection of Personality Rights against Invasion by Mass Media (2005) no 34 f.

30 *Fabre-Magnan,* Droit des obligations, Responsabilité civile et quasi-contrats[2] 43.

cussing tort law, which is understandable as these procedural techniques are not part of tort law[31].

IV. Rights to self-defence

1/27 French law does not use the term self-defence (auto-défense) but recognises *legitimate* defence (légitime défense)[32]. However, the term self-defence will be used for the sake of convenience. Self-defence is not much discussed in French tort law literature, as it typically comes up in criminal cases. Victims of crimes have the option of bringing their tort claim in the form of a civil action (»action civile«, as distinguished from the »action publique« conducted by the prosecutor) before the criminal court; self-defence is usually discussed in the context of criminal proceedings.

1/28 Self-defence is defined in the Penal Code[33]. It is no longer a justification (fait justificatif) but a bar to liability (cause d'irresponsabilité), eliminating all criminal and civil liability, whether based on fault[34] or on the fact of a thing[35]. Much as in Austrian law[36], such defence must be proportionate[37], which makes the defence legitimate (légitime défense).

V. Reparative injunctions

1/29 Such injunctions make sense when some wrongful interference with the plaintiff's rights has already occurred. They also have the effect of preventing such occurrence or repetition of the damage in the future.

1/30 This is not to be confused with reparation in kind, which addresses the past. Cases where courts order reparation in naturam are a rare occurrence. Not that reparation in kind is uncommon in court practice: many a tortfeasor would offer first aid and relief to the victim, or volunteer to repair things that have been damaged, sometimes avoiding the consequences of a law suit. However, victims typically sue for money compensation of what has not or cannot be repaired in kind.

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31 See, however, *Fabre-Magnan,* Droit des obligations, Responsabilité civile et quasi-contrats[2] 42 ff.

32 *G. Viney/P. Jourdain,* Les conditions de la responsabilité[3] (2006) no 563.

33 Art L122-5 to L122-7 Code pénal.

34 Cour de cassation, Chambre criminelle (Cass Crim) 13 December 1989, Bull Crim no 478.

35 Cass Civ 2, 10 June 1970, D 1970, 691. See *P. le Tourneau,* Droit de la responsabilité civile et des contrats[9] (2012) no 1978 ff.

36 Basic Questions I, no 2/13.

37 See *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1980.

There is authority to affirm that judges may choose either to award damages or to grant an injunction to do or not to do[38]. However, French procedural law does not offer any efficient means for the enforcement of such injunctions, thus inclining judges to use the award of damages as a deterrent, or in the form of »astreinte« (a per diem penalty to be paid per day of delay in giving the other party satisfaction), though the latter is more common in the context of non-performance of contractual obligations. **1/31**

Reparative injunctions are more likely to be requested as interim measures, following a regime that is pretty much the same as for preventive injunctions. They are governed by the Code of Civil Procedure[39], which provides access to restorative remedies by means of summary proceedings (référé) even where a serious dispute exists. Cases deal with the removal of a source of wrongful interference, such as toxic waste[40], or a scene in a film that interferes with protected personality rights[41]. Oftentimes, interim measures are not appealed and the plaintiff abandons the main claim, having obtained at least partial (and sometimes full) satisfaction. **1/32**

Though French law does not establish a hierarchy of protected interests in tort law, it appears that highly protected rights are more easily protected by way of injunction than rights of lesser importance. Ownership being a highly protected right[42], anything seeping in or moving from the neighbour's land will allow the owner to request that the disturbance be put to an end, regardless of the cost, either by »référé« or possessory action[43]. Possessory actions are open to a large pool of plaintiffs (evidence of possession suffices, no need to prove title), but French law considers from time immemorial that a present occupant will do a better job of protecting the property than a distant owner, and that at the end of the day, protection of the possessor benefits the owner. For this reason, possessory actions have been made accessible to lessees, though technically, under French law, the lessee is not a possessor, merely having the *corpus* (physical occupation) but no *animus* (belief that you have full owner's rights)[44]. **1/33**

38 *G. Viney/P. Jourdain,* Les effets de la responsabilité[2] (2001) no 39, citing a number of cases.

39 Arts 808 and 809 cited above.

40 Cass Civ 3, 17 December 2008, D 2009, 701, note *M. Boutonnet,* commented by *O. Moréteau,* France, in: H. Koziol/B.C. Steininger (eds), European Tort Law 2009 (2010) 198, nos 35–42 (oil spill caused by the sinking of the tanker Erika).

41 Such as in the film *Le pull-over rouge,* Cours d'appel (CA) Paris, 9 November 1979, D 1981, 109; *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1620 gives many other examples.

42 Described as »absolute« in art 544 Civil Code.

43 Arts 2278 and 2279 Civil Code and arts 1264 to 1267 Code of Civil Procedure.

44 Art 2278 Civil Code; *P. Malaurie/L. Aynès,* Droit Civil. Les Biens (2005) no 504; *J. Djoudi,* Action Possessoire, in: Répertoire de droit civil (2013) no 16.

1/34 The same can be said of the protection of honour and privacy, justifying the removal of a scene from a recorded television programme or film[45].

1/35 In such cases, courts will not check that all conditions applicable to a tort action in damages are met since they are directly protecting either property rights or rights of the personality: proof of the infringement of such a right suffices. They may do so, however, in the case of a resident (whether owner or tenant) complaining of the inconvenience caused by the storage of toxic waste on neighbouring land: in such a case, it is not a property right that is protected; instead we have a typical case of nuisance (trouble de voisinage), and the requirements of such tort action must be satisfied[46].

VI. Unjust enrichment by interference

1/36 A party drawing advantages from property that the law allocates to another must surrender such enrichment to the owner of such property. Supposing that I happen to receive a deposit of furniture belonging to a third party: unless otherwise agreed I am not allowed to lease them, and any monies I would make in so doing would accrue to the owner thereof. French law may of course recognise that restitution of such undue benefit be ordered under the doctrine of enrichment without cause. This doctrine is not based on a Civil Code article but derived by analogy from the action in payment of a thing not owed[47] and based on the Roman law of *actio de in rem verso*[48]. Though in principle it may be based on the enrichment without cause jurisprudence, the remedy is more based on the law of property. It is viewed as a natural consequence of the traditional definition of ownership, granting the owner the *usus, fructus,* and *abusus;* accordingly natural or civil fruits produced by a thing accrue to the owner. There are, however, situations where the bona fide possessor of things may keep those fruits despite having the obligation to restitute the thing to its legitimate owner[49].

1/37 Such claims are clearly distinguishable from claims in damages that may come in addition, for instance when the possessor acted in bad faith or dishonestly. This

45 See art 9 Civil Code cited above. See also *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1620.

46 Cass Civ 2, 20 October 1976, Bull Civ II, no 280: the Court ordered the renovation of a duly authorised pigsty operating with outdated and defective equipment causing a stench and spillage. See *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 7180.

47 Art 1235 Civil Code.

48 *Fabre-Magnan,* Droit des obligations, Responsabilité civile et quasi-contrats[2] 446–452.

49 This is, for instance, the case when an absent person presumed dead shows up, reclaiming restitution of the already distributed estate. Heirs in good faith will keep the fruits accrued after the judgment declaring him dead. See arts 130 and 131 Civil Code.

comes close to claims for recovery described at the beginning of this chapter. The point is not to evaluate a damage caused by whatever fault but to make sure that what belongs to the claimant can be fully recovered by him, either in kind or in value, when the thing has been lost or destroyed. If at fault, the defendant may of course be liable in damages to the extent of harm caused by the fact of being unlawfully deprived of property, but this comes in addition to the claim in restitution.

1/38 This is a place in property law where the moral element comes forth: only the party possessing a thing in bad faith must return the thing and the fruit that accrued during possession. The bona fide purchaser is indeed allowed to keep such fruit. In tort language, this means that the legitimate owner is prima facie to face the loss of income caused by the deprivation of property he owns in all those cases where the party found in possession of it was not at fault. This is a fair rule. The only party that would owe compensation is the one that illegitimately, by fault, misappropriated the thing and disposed of it in an illegitimate manner. Wherever this intermediate party can be identified, a tort law suit may be initiated against him by the legitimate owner who has recovered possession.

1/39 The Romanist legal tradition tends to follow a *doctrine of allocation* (Zuweisungstheorie), but the fact of depriving the owner of what belongs to him can at the same time be described as per se unlawful. There is no need, however, to prove fault since this is an action in restitution, which aims at disgorging an illegitimate profit and not an action in damages. In the case of dishonesty of the enriched person, however, there may be room for the law of tort for the compensation of additional damage. The existence of fraud or dishonesty may indeed change the coloration of such a case in the Romanist legal family as it does in the Germanic one, giving the case a fully tortious coloration. The payment may appear as compensation rather than disgorgement, but in essence, it remains disgorgement.

1/40 On the other hand, the destruction of equipment belonging to my competitor so that I may gain a competitive advantage at first sight looks purely tortious in nature, though I may misappropriate an economic advantage as a consequence of such wrongful action, much like the burglar breaking in to steal jewellery and computer equipment. Compensation for the destruction of the equipment and for the breakage of the door will be made in the form of damages. It has nothing to do with restitution, which may, however, apply to the stolen things in the second example. But may the victim recoup the wrongful benefit?

1/41 Describing the remedy as disgorgement rather than damages places the victim in a much stronger position and enhances deterrence, for instance where a thief resells drugs stolen from a pharmacy at well above the market value or regulated price. The enrichment remedy allows for more efficient disgorgement of the illicit benefit[50], whereas damages do not go beyond the mere compensation of the

50 Though criminal law may interfere to confiscate unlawful gains.

harm suffered, meaning a limitation to the market value or compensation up to the value of the thing destroyed.

1/42 Can we say that the competitor who destroys the victim's machinery in order to artificially create a monopoly situation, or who destroys the reputation of his rival for the same purpose, must compensate not on the basis of tort law but instead restitute undue benefit on an unjust enrichment basis? Unjust enrichment would favour disgorgement of the illicit benefit. *Koziol* indeed makes this contention[51], which appears counterintuitive at first sight, but is a fair and logical one. We may have a clear case of damage to property allowing for compensation for the destruction of the machine (first situation) or defamation allowing for limited compensation (second situation). In both cases, damages do not have the effect of disgorging the illicit benefit, and compensation of the economic loss will be limited, largely due to causation issues. Unjust enrichment favours full disgorgement, and thus proves a much more powerful remedy in such circumstances, also in terms of deterrence.

1/43 *Koziol* cites examples in intellectual property where, under Austrian law, remuneration obtained through patent infringement accrues to the owner of the patent, in a situation where German law only allows for compensatory damages[52]. French law also opens up the possibility of disgorgement in such a case: the Code of Intellectual Property invites the judge to take the adverse economic consequences into account, including lost benefits and benefits obtained by the defendant, when assessing damages in cases of patent infringement (contrefaçon)[53]. The language of the Code is not free from ambiguity: it uses the word damages (dommages et interêts) but the core of the text is unjustified enrichment terminology[54]. French law views this as tort when in fact it is unjustified enrichment.

51 Basic Questions I, no 2/33 ff.

52 Basic Questions I, no 2/38 ff.

53 Code de la propriété intellectuelle, art L615-7: »Pour fixer les dommages et intérêts, la juridiction prend en considération les conséquences économiques négatives, dont le manque à gagner, subies par la partie lésée, les bénéfices réalisés par le contrefacteur et le préjudice moral causé au titulaire des droits du fait de l'atteinte.«

54 It also leaves the claimant the option to request the payment of a lump sum that may not be inferior to royalties that would have been paid had the defendant requested a licence to use the infringed right (art L615-7 para 2).

VII. Creditors' »avoidance« (action paulienne)

Like other Romanist systems, French law has inherited the *actio pauliana* (action paulienne) allowing creditors to annul transactions by means of which an insolvent debtor defrauds his creditors[55]. This is not an action in damages but it prevents the damage that creditors would suffer due to fewer assets being available in distribution proceedings. In that sense it is both preventive and reparative, but it is connected in French law to the doctrine of patrimony, as defined by *Aubry* and *Rau*[56]. The aim is to protect the patrimonial rights of the creditors, especially in the absence of securities, since creditors then have a general pledge on all the assets of the debtor[57]. *Koziol* rightly connects this action with the principle of unjustified enrichment. Money will eventually go where it is supposed to. This may be identified as a moral foundation of French rules which, as connected to the doctrine of patrimony as they may be, aim at avoiding or mitigating the consequences of fraudulent actions. **1/44**

VIII. Claims for damages

Expected to appear first in a classic tort presentation, claims for damages come far afield in *Koziol's* analysis. His presentation of damages as compensatory and serving in addition a function of deterrence matches Romanist conventional analysis, though the idea that the outcome of a damages award shifts the onus of the damage to someone else is less conventional[58]. French tort law remains, in this respect, rooted in the Aristotelian idea of corrective justice. **1/45**

IX. »Punitive damages«?

French law, like other Continental systems, does not recognise claims for punitive damages. Common law systems accept them on the premise that compensatory damages are not a sufficient lever to allow tort law to perform its deterrence function. *Koziol* discusses the need for higher damages in the area of intel- **1/46**

55 Art 1167 Civil Code.

56 *C. Aubry/C. Rau,* Droit civil français, vol 2, Property (Louisiana State Law Institute, English translation) (1966). See *N. Kasirer,* Translating Part of France's Legal Heritage: Aubry and Rau on the Patrimoine, 38 Revue générale de droit (Rev gén) 2008, 453.

57 Art 2285 Civil Code.

58 Basic Questions I, no 2/49.

lectual property, where compensation and disgorgement do not suffice to prevent misuse of such rights. Rather than researching whether such punitive elements exist in French law, it suffices to say that the question once again invites a holistic approach.

1/47 Looking at the United States' reluctance to develop a welfare state and engage in heavy and costly regulatory mechanisms, punitive damages make sense. They aim at policing various industries and create incentives to adopt safety measures that such industries would not adopt spontaneously, especially when they calculate that it is less costly to compensate a few victims of defective products than to take more expensive preventive measures. The fear of unpredictable punitive damages does create incentives in this respect.

1/48 In highly regulated European countries, punitive damages need not be promoted so openly, but a punitive element may be tracked here and there. In French law, they are used as a substitute for the lack of efficient injunction enforcement mechanisms. Compensation of non-pecuniary damage, though compensatory in nature, is not entirely devoid of a punitive element. In addition, though the example comes from the law of contract, it is commonplace for French courts to order the enforcement of an obligation to do under »astreinte«, which means that a party (typically a contractor) will have to pay a per diem penalty for every day a construction project is delayed.

1/49 Punitive damages supplement or remedy the flaws of other legal mechanisms aiming at the prevention of damage, such as criminal law, safety regulations, or sometimes enforcement mechanisms. Renaming them »preventive damages« as suggested by *Gerhard Wagner*[59] may help identify the deterrence and preventive function but this does not remove the punitive element making them a private fine. On the other hand, if the purpose is disgorgement of profit, unjustified enrichment devices are a better fit and the word restitution should be used instead.

X. Insurance contract law

1/50 Considered in general, insurance appears to be a planned distribution of risk[60]. The French collectively agree that the development of universal social security or insurance coverage, compulsory insurance, combined with the multiplication of compensation funds, is the best way to make sure people do not have to face harsh consequences when hit by adverse harmful events, whether caused by wrongful activity or not. One may say that the collectivisation of risks is a strong and

59 Basic Questions I, no 2/63, FN 197.
60 Basic Questions I, no 2/68.

constant political choice, which became part of the social contract in the years that followed the end of World War II. Solidarity, a word then given constitutional value[61], prevails over individualism. On the whole, the French may be willing to sacrifice the individual possibility of full compensation rather than abandoning the idea that risks may be hedged, even if this is at the cost of lower compensation, especially as they know that their courts have never been very generous in the assessment of damages.

Whilst it cannot be denied that third-party liability insurance »considerably impedes the deterrence function of the law of tort, possibly even eliminates it«[62], the French agree that the deterrence function can be disconnected from compensation mechanisms. When promoting a strict liability scheme for the compensation of the victims of road traffic accidents, *André Tunc* insisted that the task of tort law is compensation rather than deterrence[63]. Deterrence was to be abandoned to criminal law or to other mechanisms of insurance law. The French experience proves that strict enforcement of the Highway Code with the help of criminal law and incentives in the calculation of insurance premiums offer an adequate substitute. **1/51**

Accepting that other parts of the law contribute to deterrence is no denial of deterrence as one of the functions of tort law, but this deterrence function tends to be marginal and to prosper on the forefront of new torts, before being caught by the expansion of insurance and socialisation of risk. **1/52**

XI. Social security law

The purpose of the social security system »is to secure livelihoods«[64] covering cost of treatment and loss of earning, at least to some extent. *Koziol* points out its intersection with tort law, but as said above, the solidarity element is a fundamental component of the French experience[65]. **1/53**

When a patient is to receive medical treatment as a consequence of injury that appears to be caused by accident, a social security form must be filled in, requesting the patient or his representative to indicate whether this accident was caused by a third party and, where this is the case, all relevant information must be pro- **1/54**

61 Preamble to the Constitution of 1946, cited in the Preamble of the present Constitution of 1958.
62 Basic Questions I, no 2/70. Contrast with the holistic analysis conducted by *G. Viney,* Introduction à la responsabilité[3] Title I, chapter 2, featuring contemporary developments.
63 *A. Tunc,* La sécurité routière, Esquisse d'une loi sur les accidents de la circulation (1966). See *Viney/Jourdain,* Les conditions de la responsabilité[3] no 965.
64 Basic Questions I, no 2/74.
65 Above nos 1/3 and 11.

vided. When the injuries were caused in a road traffic accident, the social security provider has recourse against the third party liable or his insurer, to recover hospital fees, medical treatment costs and sickness benefits that have been disbursed for the victim[66]. More generally, a full chapter of the Social Security Code deals with recourse against third parties, limiting legal subrogation to the recovery of what has been disbursed to the benefit of the victim, leaving the latter with the right to claim compensation for whatever exceeds social security payments[67].

XII. Compensating victims of crime and catastrophes

1/55 Victims of crime have a limited chance to recover from the perpetrator. However, French procedural law allows the victim to conduct a »civil action« before criminal courts (plainte avec constitution de partie civile), which significantly reduces litigation costs: the victim can use the evidence gathered by the prosecution and judicially led investigation. Where recovery is impossible, either because the perpetrator has not been identified or because he happens to be impecunious, a compensation fund will provide compensation. The Compensation Fund that had been created to cover damage suffered by victims of uninsured motorists now covers victims of crime when they cannot be compensated otherwise[68].

1/56 Regarding victims of catastrophes, the French do not share the Germanic concern that helping collective disaster victims would create a situation of inequality. Immediately after World War II, the Preamble to the French Constitution made national solidarity in the case of national disaster a priority[69]. From a French perspective, it would be wrong to claim that victims of disasters are better compensated than individual victims. French law in this regard wants to ensure that the risk of disaster damage remains insurable and to afford victims the benefit of national solidarity, just as when they are victims of individual accidents. It imposes compulsory coverage of damage to property as a consequence of natural disasters upon all purchasers of car or homeowner insurance, subject to a declaration of national disaster by the public authorities. The system redistributes half of the cost by way of reinsurance and the State is the ultimate guarantor in case the national system of reinsurance fails. A similar system is in place to compensate damage

66 Art 29, Law no 85-677 of 5 July 1985.
67 Art L376-1 Code de la sécurité sociale.
68 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 240.
69 Preamble to the Constitution of 1946, referred to in the Preamble to the present Constitution of 1958.

caused by technological disasters[70]. These schemes operate the same way for all victims, whether or not delictual action or omission caused the disaster or made it more harmful. Wherever tort action is available, victims may obtain additional compensation, but they are treated equally as far as compulsory insurance coverage and social security are concerned.

It is wrong to say that helping victims of disasters creates incentives to move to more risk-prone areas, for at least two reasons. Firstly, much economic activity can only develop and flourish in risk-prone areas such as floodable plains or seaports, large cities, etc. Secondly, incentives can be created to encourage people not to stay in hazardous places or press public authorities to adopt plans that may mitigate the risks. **1/57**

In all regards, the French system of prevention and compensation of victims of catastrophes remains to this day a most efficient model[71]. It redistributes and therefore minimises the risks with all necessary incentives, and is primarily based on private insurance. State regulation simply aims at keeping high risks insurable and monitoring reinsurance with the guarantee of the State as ultimate recourse. Law and economics scholars came to accept that national solidarity could justify an exception to purely market based mechanisms, as long as the policy aims at keeping high risks insurable[72]. This does not mean that this system would resist catastrophes of much larger magnitude: it is too early to predict the consequences of climate change, but the multiplication of super storms and major floods along with rising sea levels here and shortage of water there call up bleak scenarios. No State has yet invented a sustainable model in this regard, and compensation is likely to decrease as disasters intensify[73]. **1/58**

XIII. Disgorgement claims

There are situations where illicit profit is to be disgorged and yet, it is unreasonable to do this to the benefit of impoverished parties, as in traditional cases of unjustified enrichment. This may be the case where the principal victim of illicit **1/59**

70 For more detail, see *O. Moréteau/M. Cannarsa/F. Lafay,* France, in: M. Faure/T. Hartlief (eds), Financial Compensation for Victims of Catastrophes: A Comparative Legal Approach (2006) 81–118; *Moréteau* in: van Boom/Faure (eds), Shifts in Compensation between Private and Public Systems 199–218, also published in *D.A. Farber/M.G. Faure* (eds), Disaster Law (2010) chapter 18.

71 See footnote above.

72 *R. van den Bergh/M. Faure,* Compulsory Insurance of Loss to Property Caused by National Disasters: Competition or Solidarity? 29 World Competition Law and Economic Review 2006, 25–54, at 51.

73 For a general discussion, see *J. Spier,* Shaping the Law for Global Crises (2012).

activity is the environment, or millions of consumers, each for a small amount, such as in the example of anticompetitive practices. That such disgorgement must benefit charities or non-profit organisations or the State is a matter of general agreement. French law favours civil actions by non-profit organisations before criminal courts, provided they prove that the wrongful action has harmed the interest they support[74]. This is the case under competition law, which more often than not is European Union driven.

XIV. Criminal law

1/60 The only reason why criminal law must be mentioned here is that it serves the purpose of deterrence, whether regarded as special (preventing the repetition of criminal acts by the same perpetrator) or general (increasing compliance by the public). Yet, as seen, tort law and criminal law do intersect, at least in the court room (plainte avec constitution de partie civile).

XV. Concluding remarks

1/61 To a French scholar trained in the art of dividing papers into two sections and then two subsections (see the French formal garden), this exercise looks like a random inventory, »un inventaire à la Prévert«. Nevertheless, a French tort law scholar would not be shocked to see so many different rules and mechanisms intersect and interact. Even the importance of a public law element does not seem surprising, whether the public law category is defined by Germanic standards (including criminal law and social security) or French standards (leaving criminal law and social security law within the realm of private law). French law is used to having administrative law develop an autonomous body of rules to regulate torts caused by the operation of public entities, under the stewardship of the Conseil d'État.

1/62 The conclusion that »more regard should be had to how prerequisites are matched to legal consequences, above all to the fact that more onerous legal consequences call for stricter prerequisites«[75] may make sense in a world where most human and social interaction would be governed by traditional »Civil Code« mech-

74 *P. Albertini,* Rapport sur l'exercice de l'action civile par les associations, Assemblée nationale (1999). See also art 31 Code of Civil Procedure.

75 Basic Questions I, no 2/95.

anisms. However, in a complex society combining and recombining elements of private and public law, and promoting social solidarity as a key element of the public good, pragmatic approaches tend to prevail over dogmatic views.

Nonetheless at the end of the day, it seems that under French law, strict liability is often coupled with insurance, making the tortfeasor easily liable but mitigating the consequences by compulsory insurance coverage, whereas fault-based liability keeps developing in areas of higher risks that may not be insured or insurable. It may then be said that the prerequisites fit the legal consequences, though more investigation may be needed to check whether this is always the case. Last but not least, the author of these lines will not object to the necessity for clearly distinguishing claims in damages (whether based on tort or on contract) and claims in restitution, whether they aim at disgorging illicit profit or remedying an unjustified enrichment. The tasks of tort law must indeed be clarified. **1/63**

Part 3 The tasks of tort law

I. Compensatory function

1/64 All European civil law systems will agree that the law of tort is meant »to provide the victim with *compensation for damage that has already been sustained*«[76]. No sensible French jurist will contest this. Even in a case where tort law serves a preventive function, such as the landowner seeking compensation for the construction of a wall to avoid the high risk of a landslide created by the uphill neighbour having carried out unreasonable excavations, the court actually awards damages to repair damage already sustained: the reasonable expenditure is incurred for no other reason than the need to avoid imminent and serious danger[77]. Damage that appears hypothetical only should not be compensated, though French lower courts occasionally order the taking of preventive measures in such circumstances, making unwarranted reference to the precautionary principle[78]. Everyone agrees that »[T]he compensatory notion clearly expresses the purpose of tort law«[79]. This is ubiquitous in French tort law literature.

1/65 Under French law, compensation is due for any kind of damage, the Civil Code making no distinction regarding heads of damage, which therefore include pure economic loss and non-pecuniary damage (dommage moral). Compensation of the latter, however, is not easily accepted in French doctrine. In a country of Catholic culture, the idea of making money out of one's tears (battre monnaie avec ses larmes)[80] is disturbing. Compensation of non-pecuniary damage is still criti-

76 Basic Questions I, no 3/1, using the phrase »law of damages« as a translation of »Schadenersatzrecht«.

77 Cass Civ 2, 15 May 2008, Bull Civ II, no 112, RTD Civ 2008, 679, observations *P. Jourdain;* JCP 2008, I, 186, no 1, observations *P. Stoffel-Munck;* D 2008, 2900, observations *P. Brun/P. Jourdain; O. Moréteau,* France, in: H. Koziol/B.C. Steininger (eds), European Tort Law 2008 (2009) 264, nos 56–58.

78 In recent years, lower courts ordered the removal of telephone relay antennas, also granting damages to compensate the anxiety due to a possible health risk: CA Versailles, 4 February 2009, D 2009, 499, commented by *Moréteau* in: Koziol/Steininger (eds), European Tort Law 2009, 198, nos 3–11. In recent rulings, the Tribunal des conflits (TC), when asked by the Court of Cassation to rule on a purely jurisdictional issue, ruled that ordinary courts cannot order the removal of duly authorized relay antennas, without violating the principle of the separation of powers: TC 14 May 2012, Bull TC nos 12–17, commented by *On* in: Oliphant/Steininger (eds), European Tort Law 2012, 229, nos 27–42.

79 Basic Questions I, no 3/2.

80 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1553.

cised in contemporary doctrine[81]. Earlier on, *Georges Ripert* claimed that this was not compensation, but a form of private punishment of the perpetrator[82]. Despite continued doctrinal challenges[83], a jurisprudente constante has developed in the Court of Cassation, since a leading case decided in 1833[84]. The Court recently decided that a patient who had not been informed of the risk of impotence as a possible consequence of surgery (prostate adenomectomy) was eligible for compensation of non-pecuniary harm[85]. Though it is not permissible for courts to make open reference to unofficial tables, databases have been created, based on a study of court of appeal decisions, to help assess the cost of the loss of a mother, a child, or a sibling[86]. The award of a lump sum is sometimes compared to a penalty[87].

In a recent case, the Commercial Chamber of the Court of Cassation opened **1/66**
the right to recover non-pecuniary damages to juridical persons[88]. The matter had long been debated and the solution receives strong doctrinal approval[89]. Allegedly, it is possible to harm a juridical person in its essence rather than its assets (dans son être et non dans son avoir)[90]. One of the doctrinal draft reforms of the law of obligations follows this erroneous trend[91]. *Planiol* and *Ripert* offer strong authority to the contrary: they wisely state that a juridical person cannot suffer and therefore cannot be a victim of non-pecuniary damage[92]. When courts offer such compensation, either they want to compensate pecuniary damage (an economic loss,

81 *C. Atias,* Philosophie du droit[2] (2004) no 64.

82 *G. Ripert,* La règle morale dans les obligations civiles (1947) nos 181 and 182.

83 See also *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 95; *B. Beigner,* L'honneur et le droit (1995) no 1605.

84 Cour de cassation, Chambres réunies (Cass Réun) 25 June 1833, cited in *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1554.

85 Cass Civ 1, 3 June 2010, no 09-13591, Bulletin des arrêts de la Cour de cassation (Bull) I no 128, D 2010, 1522 note *P. Sargos;* RTD Civ 2010, 571, observations *P. Jourdain; Moréteau* in: Koziol/Steininger (eds), European Tort Law 2010, 175, nos 4–10.

86 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1555.

87 *Idem.*

88 Cour de cassation, Chambre commerciale (Cass Com) 15 May 2012, no 11-10278, Bull IV no 101, D 2012, 2285, note *B. Dondero;* JCP 2012, no 1224, observations *C. Bloch; Moréteau* in: Oliphant/Steininger (eds), European Tort Law 2012, 229, nos 43–47. A couple who had been in the pizza business for decades sold the shares of their company to another. In violation of a non-competition clause stipulated in the agreement, the sellers created a business selling pizza in the same district. The buyers sued for damages, claiming compensation for both economic loss and non-pecuniary damage. The Court of Appeal judgment, denying that a corporate entity could suffer non-pecuniary harm, was quashed, the Court of Cassation holding that a juridical person may suffer non-pecuniary damage, though providing no reasoning or additional guidance.

89 *P. Malaurie/L. Aynès/P. Stoffel-Munck,* Les obligations[5] (2011) no 248.

90 *P. Stoffel-Munck,* Le préjudice moral des personnes morales, Libre droit, Mélanges en l'honneur de Philippe le Tourneau (2008) 959, 967.

91 *Terré* (ed), Pour une réforme du droit de la responsabilité civile art 68 and discussion at 223 f.

92 *M. Planiol/G. Ripert,* Traité pratique de droit civil français, vol VI; *P. Esmein,* Obligations, Part I[2] (1952) no 552.

actually) that they are unable to assess, or they want to impose a non-criminal penalty, camouflaged under the name of compensation of non-pecuniary damage[93].

1/67 Though literature examined does not relate non-pecuniary damages to the seriousness of fault, the penalty theory seems to imply such a connection. This does not contradict the jurisprudential rule that the assessment of damages is to be made without regard to the seriousness of fault[94] if one admits that the non-pecuniary damage is greater in cases where the tortfeasor acted intentionally.

II. Deterrence and continuation of a right

1/68 The deterrent function of civil liability is recognised in French tort law literature[95]. As *Koziol* puts it, »the threat of a duty to compensate in the event of damage being caused undoubtedly provides a general *incentive to avoid inflicting damage*«[96]. French authors agree that the deterrence function is secondary to compensation[97], and they do not follow the tenets of law and economics on the issue: penalty rather than compensation is more apt at performing an efficient deterrence function. *Muriel Fabre-Magnan's* pages discussing and challenging the *law and economics approach,* and her conclusion that figures cannot explain everything, that reality cannot be reduced to mathematical formulae is a good reflection of French scepticism[98]: the law and economics creed that human activity is driven by maximisation of wealth is over-simplistic and cannot explain everything. It is either ignored or rejected by most scholars[99].

1/69 The fact that the widespread availability of third-party liability insurance reduces the deterrence function cannot be denied, but as *Koziol* observes, such inconvenience is easily mitigated by the appropriate use of a bonus-malus system[100], mandatory in France in the context of automobile insurance[101].

1/70 The notion of »continuation of a right« (Rechtsfortsetzungsgedanke) sees the injured right as surviving in a claim for compensation, meaning that the victim of

93 Ibidem.
94 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 2572.
95 *Viney,* Introduction à la responsabilité[3] no 40.
96 Basic Questions I, no 3/4.
97 *Tunc,* La sécurité routière, Esquisse d'une loi sur les accidents de la circulation (1966). *Viney/Jourdain,* Les conditions de la responsabilité[3] no 965.
98 *Fabre-Magnan,* Droit des obligations, Responsabilité civile et quasi-contrats[2] 44–47.
99 There is no entry on the subject in *G. Viney,* Introduction à la responsabilité[3] (2008).
100 Basic Questions I, no 3/7.
101 Art A121-1 Code des assurances; see also *Viney,* Introduction à la responsabilité[3] no 64 for critical comments on the French implementation.

property damage is to be compensated, at the minimum, for the objective market value, even if the victim subjectively is making no use of the property at the moment when the damage occurs[102]. The fact that this contributes to the function of deterrence[103] seems undisputable.

III. Penalty

Traditionally important in Roman law and ancient law, and somehow surviving in the context of fault-based liability, the punitive function has lost ground in modern days, with the development of strict liability and the collectivisation of risks. Remnants are to be seen where international instruments cap the amount of compensation payable to the victim or shield a party from all liability unless there has been intentional fault or gross negligence[104]. One still sees it at play in the case of non-performance of contractual obligations, the defaulting party in bad faith being obliged to compensate not only the foreseeable damage but also the unforeseeable, which does not mean, however, that the amount of damages will be disconnected from proven harm[105]. **1/71**

102 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] nos 2524–2533.

103 Basic Questions I, no 3/8.

104 See in the context of oil-pollution (the sinking of supertanker Erika), Cass Crim, 25 September 2012, no 10-82938, Bull Crim no 198, D 2012, 2711, note *P. Delebecque;* RTD Civ 2013, 119, observations *P. Jourdain.* Commented by *Moréteau* in: Oliphant/Steininger (eds), European Tort Law 2012, 229, nos 48–55. The International Convention on Civil Liability for Oil Pollution Damage [art III(4)(c)] places liability on the carrier, and not on the owners of the cargo. As a charterer, the oil company is not liable »unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.«

105 Art 1150 Civil Code.

Part 4 The place of torts in the law of obligations

1/72 The question of whether liability for failure to perform a contractual obligation (this term is preferred to »breach of contract« which has a strong common law overtone, presupposing the extinction of the contract by the mere fact of non-performance) is to be regarded as contractual liability and treated separately from tort or »civil« liability divides French doctrine[106]. The French Civil Code treats them separately[107]. The *Catala* draft proposal to reform the law of obligations would unify both regimes and treat them just like one[108]. On the other hand, the *Terré* draft to reform contractual and delictual obligations retains the existing architecture of the Civil Code and treats both regimes separately[109]. Whilst both regimes converge regarding compensation of losses (damnum emergens), contractual liability also entails compensation of lost profits (lucrum cessans), which makes it very different from delictual liability. Though logically separate, there are many places where both regimes intersect, offering a fascinating field for comparative studies[110].

I. Tort, contract, and the grey zone

1/73 In a previous paper, I approached the topic in a metaphoric manner, comparing tort, contract and restitution to celestial bodies. I wrote[111]:

> ▹ In French law, the contract is a big star with a very strong gravitational force. The French contract easily creates rights to the benefit of third parties. French law has developed a concept of chain of contract allowing direct action by a

106 For an overview with full references, see *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 805. The author is in favour of a unitary view.

107 Contract liability: arts 1146–1155; tort liability: arts 1382–1386.

108 Avant-projet de réforme du droit des obligations et du droit de la prescription, 22 September 2005 – cited herinafter: *Catala* draft, commented on by *Moréteau* in: Koziol/Steininger (eds), European Tort Law 2005, 270, nos 1–11. See draft art 1340.

109 *Terré* (ed), Pour une réforme du droit de la responsabilité civile – cited herinafter: *Terré* draft, commented in *O. Moréteau,* A New Draft Proposal to Reform French Tort Law, under the Supervision of Professor François Terré, in: Oliphant/Steininger (eds), European Tort Law 2011, 216, no 1 f.

110 *O. Moréteau,* Revisiting the Grey Zone between Contract and Tort: The Role of Estoppel and Reliance in Mapping out the Law of Obligations, in: H. Koziol/B.C. Steininger (eds), European Tort Law 2004 (2005) 60 ff.

111 *Moréteau,* France, in: Koziol/Steininger (eds), European Tort Law 2004, 274, no 12.

party at the end of the chain as against the one at the beginning. For instance, where sold goods are defective, the final purchaser may sue the manufacturer even where he received the goods from a retailer who purchased them from a distributor who got them from the manufacturer. In addition, many contracts are said to contain an implied contractual *obligation de sécurité,* whereby carriers, medical doctors or suppliers of goods must compensate victims of personal injury and collateral losses.

I further expounded on the analysis of contractual obligations under French law[112]: **1/74**

- French law distinguishes two types of contractual obligations. The *obligation de résultat* is a typical contractual obligation where the party must perform and achieve the promised result. The duty for the seller to deliver the goods falls within this category, as well as the duty to transport the goods from the point of departure to the point of arrival in a contract of carriage of goods. The party in breach of such a duty is liable and there is no need to prove negligence. However, in some cases, a party is not bound to reach a promised outcome but to act with due care, in which case the obligation is called *obligation de moyens.* The carrier of passengers can be made liable for the breach of such an obligation where a passenger slips on a snowy platform when boarding the train. In such cases, it is necessary to prove negligence; for instance, the defective maintenance of the railway platform[113].
- Liability for medical malpractice offers a good example. Such liability is based on contract in French law. As a rule, the practitioner is not bound by an »obligation de résultat« since in most cases there is no obligation to cure patients. In medical contracts, such an obligation may only exist where for instance a dentist promises to adjust and fix a cap on a tooth. Doctors are said to owe an »obligation de moyens«, whereby they must act with due care according to established scientific knowledge, as the courts repeatedly hold, following a landmark Cour de cassation case, the *Mercier* case, decided in 1936[114]. As a rule, the victim must prove negligence. In some cases, however, the courts reverse the burden of proof and hold that negligence is presumed. Interestingly, in England, similar cases are decided not on the basis of contract but under the tort of negligence. The patient will have no difficulty in

112 *Moréteau* in: Koziol/Steininger (eds), European Tort Law 2004, 274, no 19.

113 Such an obligation, called an obligation of safety (obligation de sécurité), is analysed by the courts as an obligation of result when the damage occurs between the time the passenger boarded the train and the moment when he has stepped off. All these rules have been devised by the courts with minimal (if any) Code support. See *O. Moréteau,* Codes as Straight-Jackets, Safeguards and Alibis, 20 North Carolina Journal of International Law 273, 285 (1995).

114 Cass Civ, 30 May 1936, [1936] Dalloz, I, 88.

proving the existence of a duty of care, given the special relationship stemming from the contract between the patient and the practitioner. However, it may be quite difficult to establish that the doctor breached such duty and acted negligently[115].

1/75 The Court of Cassation has in the meantime changed the characterisation of the medical obligation from a contractual obligation of means into a legal one stemming from the Code of Public Health[116], making its violation a tort[117]. This does not change the regime of the obligation, even regarding prescription, as the reform of prescription adopted in 2008 unified the regimes of tort and contractual obligations in this regard[118].

1/76 *Koziol* cites German and Swiss doctrine identifying a »third lane« between tort and contract[119]. *Canaris* (Germany)[120] and *Loser* (Switzerland)[121] base this in-between liability on principles of reliance (Vertrauenshaftung), as I also did in my doctoral work stemming from a study of the law of estoppel[122]. In my Grey Zone article, I proposed to map out the law of obligations not as a triangle featuring tort, contract and restitution, but a quadrangle adding the concept of reliance or estoppel as a fourth corner, and identifying connections between all four corners. Reliance or estoppel is more than a »third lane« or »core area«[123] between tort and contract. It also intersects with restitution[124]:

1/77 The four corners of the law of obligations may be described by the following words used here in a very loose sense, followed by an indication of their basic function:

- contracts: referring to an obligation to perform;
- torts: referring to an obligation to compensate;
- restitution: referring to an obligation to give back;
- estoppel: referring to an obligation not to deny.

1/78 All four terms are meant to designate a basic function of the law of obligations, for the sake of comparison. Each corner may interfere with the other three (hence

115 *Moréteau* in: Koziol/Steininger (eds), European Tort Law 2004, 274, no 20.
116 Art 1142-1 Code de la santé publique.
117 Cass Civ 1, 3 June 2010, *P. Sargos;* RTD Civ 2010, 571 (above FN 13).
118 Law no 2008-561 of 17 June 2008 Reforming Civil Prescription, *Moréteau* in: Koziol/Steininger (eds), European Tort Law 2008, 264, nos 1–12.
119 Basic Questions I, no 4/6.
120 *C.W. Canaris,* Die Vertrauenshaftung im deutschen Privatrecht (1971).
121 *P. Loser,* Die Vertrauenshaftung im schweizerischen Schuldrecht (2006).
122 *O. Moréteau,* L'estoppel et la protection de la confiance légitime (1990) (<http://digitalcommons.law.lsu.edu/faculty_scholarship/12/>).
123 Terms used in Basic Questions I, no 4/6.
124 *Moréteau* in: Koziol/Steininger (eds), European Tort Law 2004, 274, no 63 f.

formidable confusion in the literature and the terminology), as will be observed, when considering them in turn.

This framework, comparative in essence, may be helpful in describing cases decided in any intermediary grey zone or »interim area«, as *Koziol* puts it[125]. **1/79**

II. Cases in the grey zone or »interim area«

Many of those cases that are not core cases of tort law or contract law, but seem to fall in between, tend to be addressed as contract cases under French jurisprudence, though this is not always the case. French courts have a long history of stretching the scope of contractual obligations, so that they may benefit third parties. For instance, warranties owed by the seller to the buyer have been extended to sub-purchasers under the doctrine of chain or group of contracts, and benefits may be stretched to non-party users such as members of the household or family, such being justified under an implied stipulation to the benefit of a third party. The doctrine of chain or group of contracts has been largely abandoned, the Court of Cassation now insisting on the relative effect of contract stated in art 1165 of the Civil Code[126], and no longer allowing third-party victims of contractual non-performance to sue for contractual liability, at least in most circumstances. Third-party victims of damage caused by a defective product in any case no longer need to ride on contractual warranties, now that they benefit from a *sui generis* regime under the European Directive of 1985. **1/80**

Moreover, French courts are prompt to infer non-negotiated implied obligations to ensure the safety of the other party (obligation de sécurité), in contracts of transportation, medical contracts, contracts with amusement parks, restaurants and more generally facilities open to the public[127]. The doctrinal distinction between obligations of result *(obligation de résultat)* and obligations of means *(obligations de moyens)* allows for case-by-case fine tuning. An obligation of result will be identified where courts favour traditional no-fault based contractual liability (strict liability if based on tort law), and the obligation will be characterised as »of means« where it is clear that the party owes no result but best efforts, in which case proof of negligence must be adduced. In such cases, the requirements are equivalent to fault-based tort liability. As mentioned above, liability for medical malpractice tends to retreat from the realm of contract to be treated as tort liability. **1/81**

125 Basic Questions I, nos 4/9–17.

126 Cour de cassation, Assemblée plénière (Cass Ass Plén) 12 July 1991, D 1991, 549; JCP 1991, II, 21743, note *G. Viney,* RTD Civ 1991, 750, observations *P. Jourdain.* The owner may not sue a sub-contractor, though there is a chain of contract between owner-contractor and contractor-sub-contractor.

127 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 500.

1/82 The general requirement that contracts are to be performed in good faith[128] is understood as creating a duty to cooperate[129]. It allows courts to identify contractual duties not to act against the interest of the other party[130]. The obligation of loyalty imposed on employees is an example: it is inferred from art 1135 of the Civil Code, stating that: »Agreements oblige not only as to what is therein expressed, but also as to all consequences which equity, usage or the law give to the obligation according to its nature.«

1/83 One may note the strong connection between cooperation, loyalty, good faith and reliance. Whenever it can be connected to an existing contract, contractual liability is likely to prevail.

1/84 The counter-example of a case in the grey or interim zone that may be treated as tort, and not as contract, is pre-contractual liability. The first situation is where the court is convinced that in the course of the negotiations, parties entered into a pre-agreement (avant-contrat), in which case breach of the negotiation may be treated as non-performance of the avant-contrat, triggering contractual liability. The second situation is where, according to court findings, the parties have developed a strong relation of confidence and are getting very close to entering into a contractual relationship, though no pre-agreement may be identified at this stage. Because of clear representations by one party of the intention to contract, the other party relies on such representations and incurs transaction costs that may not have been reasonable in the absence of such representations and the situation generating reliance. In this case, breaking off the negotiation may trigger tort liability. *Culpa in contrahendo* or pre-contractual liability under French law is therefore either contractual, or delictual. One may, however, observe a strong tendency of French courts to identify the existence of an »avant-contrat«, as they do not like to have liability rest on a unilateral manifestation of intent. In the author's opinion, French doctrine errs when systematically looking for a manifestation of will as a justification of liability in culpa in contrahendo cases, as such liability is delictual rather than contractual in the absence of a clear agreement or unilateral juridical act. The few scholars insisting that liability is reliance-based (Vertrauensprinzip) rather than intention-based remain a minority to this day[131].

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128 Art 1134 Civil Code.

129 *Y. Picod,* Le devoir de loyauté dans l'exécution du contrat (1989).

130 *M. Fabre-Magnan,* Droit des obligations I: Contrat et engagement unilatéral[3] (2012) 69.

131 *E. Levy,* Responsabilité et contrat, Revue critique de législation et jurisprudence 1899, 361; *idem,* La confiance légitime, RTD Civ 1910, 178; *A. Albarian,* De la perte de confiance légitime en droit contractuel, Essai d'une théorie (2010); *Moréteau,* L'estoppel et la protection de la confiance légitime (1990).

III. The problem of concurrent claims

1/85 Do plaintiffs benefit from an option where liability can be either contractual or delictual? When asking this question, *Koziol* no longer discusses »interim« cases, but »core« cases[132]. The question is debated in French doctrine. The traditional distinction between tort and contract liability, reflected in the architecture of the Civil Code, has been challenged in recent years. Some claim that contractual liability never existed[133]. Without going that far, the authors of the *Catala* draft reform of the law of obligations propose to gather all rules relating to contractual and extra-contractual liability in the same section of the Civil Code, which does not mean that they will be the same[134]. Many authors resist a merged approach, including the authors of the *Terré* draft reforms of contract and tort, who keep contract and tort liability in separate sections of the Code[135].

1/86 Courts have not abandoned the traditional approach and keep deciding that a plaintiff has no freedom to opt between contractual and delictual liability. Each has a separate regime and it is necessary to identify which cause of action is to prevail[136]. The judge is to decide, in each case, which is the proper route. The system is known under the name of *règle du non-cumul,* but it actually means that firstly, one may not opt for one or the other regime, and secondly that one may not combine rules of contract liability with tort liability, or of course claim contract damages in addition to tort damages[137]. The reform of the law of prescription in 2008 aligned both regimes, limiting the strategic interest parties may have had in playing one regime against the other[138]. The French system has not fully accepted the idea of a »uniform basis for the claim«[139]. The *Catala* draft, though endorsing a unitary presentation of tort and contract liability, does not abandon the »règle du non-cumul«, so that contractual clauses may not be by-passed, whether intended to liquidate the amount of damages to be paid or to limit or exclude liability[140]. However, the *Catala* draft would allow the victim of physical harm to choose the most favourable regime[141].

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132 Basic Questions I, no 4/20.

133 *P. Rémy,* La responsabilité contractuelle, histoire d'un faux concept, RTD Civ 1997, 323; *le Tourneau,* Droit de la responsabilité civile et des contrats[9] nos 802–813.

134 Above no 1/72.

135 Ibidem.

136 *P. Malaurie/L. Aynes/P. Stoffel-Munck,* Les obligations (2004) nos 997–1011.

137 Ibidem.

138 Law no 2009-561 of 17 June 2008, discussed below in no 1/215 ff. The prescription period is now five years for personal action, except in the case of bodily injury where it is ten years running from the time of consolidation of the injury.

139 Basic Questions I, no 4/19.

140 Art 1341 *Catala* draft.

141 Art 1341(2).

1/87 *Koziol* discusses the problem of concurrent claims focusing on the requirements that need to be satisfied in order to make the other party liable. He does not insist on the quantum of compensation, or to be more precise, whether the plaintiff will receive compensation for his losses only (damnum emergens, reliance damages, protection of the negative interest), or may claim and receive, instead or in addition, compensation of the profit expected from the contract, such as the benefit anticipated from the resale of goods that have been ordered but not delivered (lucrum cessans, expectation damages, protection of the positive interest). The matter is of importance, since compensation of the economic loss consisting in deprivation of expected profit is only available in the case of non-performance of a typical contractual obligation[142]. The only place where *Koziol* discusses the extent of compensation relates to non-pecuniary losses[143]. Under French law, non-pecuniary losses can be recovered not only under tort liability but also on a contractual basis. One may be tempted to believe this is due to the fact that many actions for compensation of bodily injury are based on failure to perform a contractual obligation of safety. However, this seems to be a much more general practice. As a rule and without much discussion in legal literature, though there is no express support in the Civil Code[144], French law allows actions for compensation of non-pecuniary damage in the case of non-performance of core contractual obligations[145].

1/88 *Koziol* tries to assess which of tort or contract liability is farther-reaching[146]. The answer is complex and variable depending on which aspect is looked at and what time period of the development of French law is considered. There was a time when victims of transportation accidents preferred a contractual action against a public carrier in order to benefit from a contractual obligation of safety, but if the court described it as an obligation of means rather than of result, proof of negligence would be requested just as if the case had been based on fault-based tort liability (art 1382). However, the moment courts developed strict liability based on the custody of the thing (art 1384), tort liability became more attractive. All the more when the law of 1985 on road traffic accidents made special provision in favour of victims, developing a system of absolute liability.

142 Art 1149 Civil Code: »Damages due to the obligee are, in general, for the loss he suffered and the profit of which he was deprived…«.

143 Basic Questions I, no 4/24.

144 Contrast with art 1998 of the Louisiana Civil Code, making express provision in view of compensation of non-pecuniary harm where the contract is intended to gratify a non-pecuniary interest, or when the failing obligor intended, by his failure, to aggrieve the feelings of the obligee.

145 *Malaurie/Aynes/Stoffel-Munck,* Les obligations no 961.

146 Basic Questions I, no 4/22.

1/89 More generally, it may be said that while expectation damages may be obtained in a non-performance of contract case, the victim of a tort may escape a contract clause limiting the amount of damages. The French system of »non cumul« (which would be better termed the »non option« rule)[147] prevents victims from remedy shopping. French law can no doubt be cited as an example of a system where one must apply one regime to the exclusion of the other, though this does not necessarily mean that the requirements will be much different.

147 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] nos 1016–1031 uses the term »règle de non-option«.

Part 5 The basic criteria for a compensation claim

1/90 From a French point of view, *Koziol's* presentation is in reverse order, moving from damage to causation (chapter 5) and then to wrongfulness (chapter 6). The French traditional view is to move from fault to causation and deal with damage last, but some contemporary authors would also start with damage and then move to causation, leaving the study of fault and strict liability to other chapters[148]. Starting with damage fully makes sense when considering tort law in its compensatory function, regardless of where we are[149].

I. Damage

A. Definitions

1/91 French law agrees that the existence of damage is a prerequisite for any right to compensation to arise. This of course excludes punitive damages, since they are not compensatory in nature[150]. It is also clear in French literature (though this is not reflected in contemporary legislation)[151] that the compensation of harm is to be separated from unjustified enrichment based restitution.

1/92 The French Civil Code requires the existence of damage, without giving a definition thereof[152]. The definition given in the PETL under the heading »Recoverable Damage« is acceptable under French law: »Damage requires material or immaterial harm to a legally protected interest«[153]. However, French doctrine uses different words.

1/93 The French distinguish between *dommage* and *préjudice.* »Dommage« is the translation of the Latin »damnum«, meaning a loss as opposed to a gain (lucrum). *Damnum* and *lucrum* have no legal meaning[154]. *Mazeaud* explains that under the

148 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] Part 1, Title 2, nos 1300–3200.
149 Basic Questions I, no 5/1.
150 Above no 1/46.
151 Above no 1/43. Note that this is *lex specialis*.
152 Art 1382 Civil Code. *Koziol* explains that only a few legal systems define damage, and these include Austria (ABGB § 1293); Basic Questions I, no 5/2.
153 Art 2 : 101 Civil Code.
154 *R. Rodière,* note on Cass Civ 1, 21 October 1952, JCP 1953, 7592, cited in *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1305.

lex Aquilia, »damnum« describes harm to a thing, regardless of whether it caused a »préjudice« to the owner[155]. »Préjudice« is a legal term (»praejudicium«, formed from the word »jus«), describing the consequence of the harm (often referred to as a »lésion«). Préjudice corresponds to recoverable damage. For instance, bodily injury (damnum) may generate several *préjudices patrimoniaux* such as loss of income, medical expenses, etc, and *préjudices extrapatrimoniaux* (pain and suffering, loss of amenity)[156]. In English we would say that bodily harm may generate pecuniary and non-pecuniary damage, and in this context, damage means recoverable damage. Just as harm is often confused with recoverable damage, the French tend to confuse »dommage« and »préjudice«. The former is fact and the latter is legal in essence[157]. The distinction is important in the opinion of many authors[158], for instance in private international law: harm may occur in a given jurisdiction (the country of the accident) and recoverable damage may be suffered in another jurisdiction[159]. *le Tourneau* insists that harm or »dommage« may generate a profit for the victim. A first example is when I am under an obligation to pull down an old building I own, and a truck crashes into it, saving me the expense of destruction. A second example is where the victim of an accident must, because of bodily injury, abandon an earlier job and take a new one that turns out to be more profitable[160]. The idea that *dommage* and *préjudice* must be distinguished is not a matter of general agreement. *Viney* points out that the two words are interchangeable in the Civil Code and in court decisions, as well as in a number of leading books[161]; she is not convinced that the distinction has significant practical consequences[162].

French jurists would agree that for damage to be recoverable »there must be impairment of interests recognised and therefore *protected* by the legal system«[163]. This perfectly translates the notion of »atteinte à un intérêt juridiquement protégé«, which is ubiquitous in French tort literature[164]. Again, this does not appear **1/94**

155 *H. Mazeaud/L. Mazeaud,* Traité théorique et pratique de la responsabilité civile[4], vol 1 (1947) no 208, FN 1.

156 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1305.

157 See Basic Questions I, no 6/6, also insisting that damage is not an economic term.

158 *L. Cadiet,* Les métamorphoses du préjudice, in: J.R. Savatier, PUF (1998) 37; *P. Brun,* Responsabilité civile extracontractuelle[2] (2014) no 215.

159 Cass Civ 1, 28 October 2003, D 2004, 223, note *P. Delebecque,* RTD Civ 2004, 96, observations *P. Jourdain*.

160 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1305.

161 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 246-1.

162 Ibidem.

163 Basic Questions I, no 5/3.

164 Between the 1930s and 1970, the Court of Cassation added the adjective *legitimate* (intérêt légitime juridiquement protégé) in order to deny compensation to a concubine, who was the indirect victim (par ricochet) in the case of the tortious death of her companion. This line was abandoned in Cass Mixte 27 February 1970, D 1970, 201, note *R. Combaldieu,* JCP 1970, II, 16305, conclusions *R. Lindon,* note *P. Parlange,* RTD Civ 1970, 353, observations *G. Durry.* See *Viney/Jourdain,* Les conditions de la responsabilité[3] no 272.

in the Civil Code, which does not even use the word »préjudice«. As in Austria, »[T]his criterion derives from fundamental principles of our legal systems«[165] so that it may be described as a common core element. Like other legal systems, French law does not protect the interests of thieves or other fraudulent persons suffering loss to property illegally obtained: illicit damage is not recoverable[166], the termination of illicit situations having been identified as one of the tasks of tort law[167].

1/95 As in other jurisdictions, tort law in France protects subjective rights, which makes it difficult to apprehend damage to general interests such as the environment[168]. The limits of private law are put to the test in this respect. The French allow compensation to be paid to public authorities and also to non-profit organisations that fight for the preservation of the general interest at stake[169]. Whether these interests are to be allocated to the public sector[170] is left to be seen. Further comparative studies are needed to promote more creative solutions, such as those found in the United States where the concept of public trust is used[171], or countries like Bolivia or Ecuador that recognise that mother nature has rights that may be infringed and must be compensated[172].

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165 Basic Questions I, no 5/4.

166 *M. Puech,* L'illicéité dans la responsabilité civile extracontractuelle (1973).

167 *C. Bloch,* La cessation de l'illicite (2008).

168 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1482.

169 For instance, in the case of the major oil pollution caused by the sinking of supertanker Erika (Tribunal de Grande Instance [TGI] Paris, 16 January 2008, commented on by *Moréteau* in: Koziol/Steininger [eds], European Tort Law 2008, 264, nos 48–55, upheld on appeal and confirmed on this point by the Court of Cassation: Cass Crim, 25 September 2012, no 10-82938, Bull Crim no 198, D 2012, 2711, note *P. Delebecque;* RTD Civ 2013, 119, observations *P. Jourdain.* Commented on by *Moréteau* in: Oliphant/Steininger [eds], European Tort Law 2012, 229, nos 48–55); the defendants had to pay damages to »the local authorities to whom the law grants a specific competence in matter of environment, conferring upon them a special responsibility in the protection, management, and preservation of a territory«. Only those authorities having proved effective harm to a sensitive zone got compensation. Given its object, the LPO (Ligue de protection des oiseaux) was also eligible. The Parisian lower court noted the large scope of the disaster affecting the thousands of birds hibernating in the region, and also the very efficient role of the LPO in taking care of the birds during several months and in connecting with the local authorities and population, as well as its national and international representativeness. Such harm appears to be considered objectively rather than under consideration of the person of the victim. It had been recognised before but never with such high scale compensation: *L. Neyret,* La réparation des atteintes à l'environnement par le juge judiciaire, D 2008, 170, at 172.

170 As suggested by Basic Questions I, no 5/5.

171 See the Oil Pollution Act 1990; *O. Moréteau,* Catastrophic Harm in United States Law: Liability and Insurance, American Journal of Comparative Law 69, 92 (2010).

172 *S. Monjean-Decaudin,* Constitution et équatorianité: la Pacha Mama proclamée sujet de droit, 4 Revue histoire(s) de l'Amérique latine 2010, no 3.

B. Pecuniary and non-pecuniary damage

1/96 Based on the doctrine of patrimony, the French distinguish *préjudice patrimonial* (pecuniary damage) from *préjudice extrapatrimonial* (non-pecuniary damage). Non-pecuniary damage may find its source in bodily injury, but it may also be »moral« damage (dommage moral) such as in cases of infringement of personality rights. It may also be linked to damage to property, such as the pain for the loss of a dear pet[173].

1/97 French law long resisted the idea that non-pecuniary damage could be compensated[174]. *Esmein* blamed the commercialisation of pain[175], while others pointed out the difficulty of establishing with reasonable certainty that such damage exists, not to mention the problem of assessment[176]. As mentioned above[177], in a country of Catholic culture, the idea of making money out of one's tears (battre monnaie avec ses larmes)[178] is disturbing. Though the debate is not fully extinguished[179], compensation of non-pecuniary damage is nowadays common practice[180]. A »jurisprudence constante« has developed in the Court of Cassation, since a leading case decided in 1833[181], to the effect that as a matter of principle, non-pecuniary damage must be compensated, just like any damage, regardless of its magnitude (gravité) or particular nature (consistance)[182]. As mentioned earlier[183], though it is not permissible for courts to make open reference to unofficial tables, databases have been created, based on a study of court of appeal decisions, to help assess the cost of the loss of a mother, a child, or a sibling[184]. The award of a lump sum is sometimes compared to a penalty[185].

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173 Long rejected, compensation was admitted in a famous *Lunus* case (Lunus being the lost dog's name): Cass Civ 1, 16 January 1962, D 1962, 199 note *R. Rodière,* JCP 1962, 12557 note *P. Esmein.* See *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1565, also citing, at no 1566, Cass Civ 25 January 1989, D 1989, 253 note *P. Malaurie,* where moral damage for the loss of vacation photos was compensated.

174 See the following doctoral dissertations: *A. Dorville,* De l'intérêt moral dans les obligations (1901); *F. Givord,* La réparation du préjudice moral (1938); *R. Nerson,* Les droits extra-patrimoniaux (1939).

175 *P. Esmein,* La commercialisation de la douleur morale, D 1954 Chron 113.

176 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] nos 1553 and 1555.

177 Above no 1/65.

178 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1553.

179 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] nos 95 and 1554 wishes compensation of non-pecuniary damage would disappear.

180 *G. Mémeteau,* La réparation du préjudice d'affection ou: la pierre philosophale, Gazette du Palais (Gaz Pal) 1978, 2, 400. See also *Viney/Jourdain,* Les conditions de la responsabilité[3] no 253.

181 Cass Réun 25 June 1833, cited in *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1554.

182 Cass Civ 2, 7 July 1983, Gaz Pal 1984, 1, panorama 64; *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1554.

183 Above no 1/65.

184 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1555.

185 *Idem.*

1/98 The question of whether a victim of bodily injury may be awarded non-pecuniary damages when unconscious or in a vegetative state was a matter of debate in the 1980s[186]. While *subjectivists* insisted that the victim's consciousness is required for compensation to be awarded, *objectivists* claimed that this is not a legal requirement and that compensation is to be paid regardless of subjective evidence of pain and suffering. The Court of Cassation embraced the objective position, ruling that compensation of damage is not contingent upon the victim's perception, but is to be based on the judge's objective assessment of the alleged damage[187]. The moral basis lies in the recognition that though in a vegetative state, a victim remains a human being and may feel joy or pain. The inability to move around and to communicate with caregivers and loved ones is undisputedly actual harm. Denying compensation to the allegedly unconscious would mean we regard such victims as dead, or as things, which is contrary to human dignity. From a strictly legal standpoint, the issue resides in certainty of damage: the point might be made that the existence of damage is uncertain. It is important that plaintiffs establish undisputable harm, like incapability to move, to emerge to consciousness, to express thoughts and feelings.

1/99 In two recent cases decided on the same day[188], two victims of road accidents died, within one hour (first case) and two weeks (second case) following the crash. Their successors sought compensation for moral damage in respect of the feeling of loss of life expectancy suffered by the victim between accident and death. Both claims were dismissed due to the victims' full loss of consciousness and absence of evidence that the victims could have been aware of the situation. The Court of Cassation affirmed this ruling, using wording showing deference to the lower judges as regards the determination of the certainty of damage. After all, the existence of the feelings in question was conjectural and lacked certainty. A 2013 judgment caused some to wonder whether the Court of Cassation might be returning to a subjective approach[189]: the Court approved a Court of Appeal judgment reducing damages granted to compensate a victim's suffering by half (€ 5,000 instead of € 10,000), due to almost instantaneous death, hereby relying on the lower court's factual findings. The dismissal of the claim based on loss of a chance to survive was confirmed. The appellate judges had rightly observed that any right to live up to a statistically determinate age is insufficiently certain, because of the aleatory character of human life, risk of disease, etc. There is no subjective element in the judgment.

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186 See *le Tourneau,* Droit de la responsabilité civile et des contrats[9] nos 1557–1561 for a full discussion and references.

187 Cass Crim 5 January 1994, Bull Crim no 5, JCP 1995, IV, 862.

188 Cass Crim 5 October 2010, D 2011, 353, note *J.J. Lemouland/D. Vigneau,* JCP 2011, 435 note *C. Bloch,* RTD Civ 2011, 353, observations *P. Jourdain*.

189 Cass Crim 26 March 2013, JCP 2013, 675, note *D. Bakouche*.

Indirect victims may also claim compensation for their non-pecuniary damage, such as their suffering upon the loss of a dear one or suffering due to the fact that the direct victim is in a vegetative state[190]. **1/100**

The compensation of bodily damage is usually accompanied by compensation of non-pecuniary damage[191]. An official list *(Nomenclature Dintilhac)* includes, inter alia, deficits (lack or impairment in a functional capacity), pain, »préjudice esthétique« (disfigurement), sexual impairment, damage caused by evolutive pathology, etc., a list that opponents find shockingly long and unreflective of the unity of the person[192]. The list simply reflects the multiple possible miseries of our human condition. **1/101**

Non-pecuniary damage linked to infringement of personality rights is another big chapter, which has generated abundant literature[193]. The fact that monetary compensation of this type of damage may be the only way to sanction an infringement of personality rights is not disputed, and a sufficient amount must be awarded to serve both as a sanction and a deterrent[194]. The problem is that such rights can be monetized *(Koziol* talks about commercialisation)[195]. The boundary between extra-patrimonial and patrimonial rights then becomes a thin one, not easy to draw[196]. The right everyone has to one's own image and privacy under French law[197] may serve as an example. A case decided in Paris in 1975 featured French superstar Catherine Deneuve suing a male magazine that had published photos of her in the nude with the story of her intimate life under the title »Catherine Deneuve superbe star«[198]. She had consented to the publication of photos taken at a time when she was acting as a professional model, occasionally posing in the nude. The magazine which then published said photos sold them to another magazine that republished them years later, at a time when Catherine Deneuve had become an iconic and highly respected actress. Though the maga- **1/102**

190 Cass Civ 1, 29 November 1989, Bull Civ I, no 369; see *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1562 for critical comments.

191 Two doctoral dissertations *(L. Cadiet,* Le préjudice d'agrément, Poitiers, 1983; *M. Guidoni,* Le préjudice esthétique, Paris I, 1977) and many articles discuss the matter, cited in *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1581.

192 For more detail, see *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1583; see nos 1581–1596 for a full survey.

193 From the long list in *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1603, a comparative study is to be singled out: *O. Berg,* La protection des intérêts incorporels en droit de la réparation des dommages, Essai d'une théorie en droit français et allemand (2006).

194 Basic Questions I, no 5/10.

195 Basic Questions I, no 5/13.

196 This discussion cites, often verbatim, an excerpt of a book review I wrote of *N.R. Whitty/R. Zimmermann* (eds), Rights of Personality in Scots Law: A Comparative Perspective, 4 Journal of Civil Law Studies 217 (2011).

197 Art 9 Civil Code.

198 Paris 14 May 1975, D 1976, 291, note *R. Lindon*.

zine owned the pictures, Catherine Deneuve was allowed to object to the publication and argue that her personality right to her image had been invaded[199]. The court held that the magazine should have requested her consent prior to publication. Any attorney or scholar familiar with French cases knows that the more a person protects her privacy or image rights, the more likely she is to be awarded higher damages in the case of an infringement of such rights. In contrast, famous people who usually tolerate the publication of gossip and photos taken within the realm of their private life, though not losing the right to protection — which after all is inalienable and may not be abandoned — are more likely than not to get minimal or nominal damages. Given the fact that tabloids will publish gossip anyway to maximise their sales, celebrities, by choosing not to tolerate any infringement, can monetize their private life and image by selling *ex ante* the right to publish under pre-determined conditions, or collecting *ex post* in the form of damages that French courts try to keep sufficiently high to serve as a deterrent.

1/103 *Koziol* seems to favour the compensation of non-pecuniary harm to legal entities, based on the argument that they may have personality rights. He cites the work of *Fellner*[200], who »points out that personality rights are intended to regulate co-existence within society and that legal entities are also members of this society and participate in legal relations«[201]. Both points cannot be denied but are loosely connected. This standpoint may disregard the strong link between personality rights and human dignity. Dignity deals with self-esteem and intimate feelings connecting with what makes us human beings. Legal entities do not share such feelings, they are not conscious beings[202]. Personality rights go beyond the concept of personality, which is a human and legal construct. They echo our human nature. Legal entities are convenient fictions that allow human beings to trade and defend collective interests. One would not give corporations a right to vote at political elections, a right not to be sold because this would be slavery, or a right to paternity or maternity though they may be parent companies. The author of this chapter strongly objects to the United States Supreme Court's recognition of a right of speech for legal entities[203], which allows those who control big business to have the corporation spend unlimited amounts of money to finance electoral campaigns. Does membership in society and participation in legal relations trans-

199 The accompanying text telling the actress' love stories, which had earlier on been known to the public, was equally regarded an infringement, since she had been very discreet in more recent years, not tolerating any gossip about her alleged liaisons. Substantial damages were awarded to compensate infringements to both image and privacy rights.

200 *M.-L. Fellner,* Persönlichkeitsschutz juristischer Personen (2007).

201 Basic Questions I, no 5/22.

202 For this reason, I profoundly dislike the French term *personne morale,* used to describe legal entities.

203 *Citizen United v. Federal Election Commission,* 558 United States Supreme Court Reports (US) 310 (2010).

form corporations to full citizens? With respect, the recognition of fundamental rights such as political rights or personality rights of legal entities may at the end of the day undermine the protection of human rights.

French courts accept compensation of non-pecuniary damage suffered by legal entities[204], while not going as far as bestowing personality rights upon them. Though serving practical purposes in cases where pure economic loss is difficult to assess[205], this jurisprudence is based on false ontological premises. **1/104**

Koziol discusses at length compensation of impairment of leisure time and holiday, which he finds difficult to pin down between pecuniary and non-pecuniary damage[206]. Not much is to be found on the topic in French law – if anything, at least after superficial research. It is clear that the expense of renting a replacement when an object (eg a car) is damaged is pecuniary damage. However, what about awarding damages even when the victim does not rent a car, just because there has been loss of use[207]? Under French law, compensation must cover the entire loss but should not exceed it[208]. It is therefore difficult to imagine how a court could award damages to compensate the cost of car rental where the victim simply used alternative transportation at no additional cost. A real life example: my car was damaged in an accident during family vacations in Tuscany. There is no doubt that the party at fault had to compensate the cost of one-week's car rental; this was pecuniary damage covered by liability insurance. However, the car could not be completely repaired in Italy within the remaining week of our seasonal stay. We consequently abandoned our plan of spending an additional week moving on to the Lakes and Tyrol, drove back to Lyon and had the car fully repaired before resuming normal activity. My family and I were deprived of one-week's vacation. Did we suffer a non-pecuniary loss (the grief of being deprived of a third of our vacation time), or a pecuniary loss (the reasonable cost of this additional week based on our spending patterns)? Unless we actually spent this additional money (plus extra car rental and the money to have our car fully repaired in Italy or returned unrepaired to Lyon) to have our three-week holiday despite the difficulties, there is no extra pecuniary damage. This is a situation where as victims we had the option of either maximising our loss with a chance of compensation, or minimising it. Damages might be fair to the victim who mitigates, and yet of an ambiguous nature if awarded: compensation of pecuniary damage where the award covers the **1/105**

204 *V. Wester-Ouisse,* Le préjudice moral des personnes morales, JCP 2003, I, 145.

205 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 260, citing cases of harm to reputation, wrongful disclosure of business secrets. In all these cases, some patrimonial interest is infringed, causing pure economic loss. Above no 1/66.

206 Basic Questions I, no 5/23.

207 Basic Questions I, no 5/24.

208 »La réparation du dommage ne peut excéder le montant du préjudice« Cass Civ 2, 21 June 2001, Bull Civ II no 212 ; *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 2545.

cost of a one-week vacation, or non-pecuniary damage if of a significantly lower amount. No law suit was filed and the action is prescribed.

1/106 Had I claimed compensation for the cost of a one-week holiday, I might have faced the objection that the damage was not direct[209]. The direct cause of the alleged loss was after all my decision to shorten the holiday. However, since my decision was reasonable, it did not break the chain of causation. I could have recovered non-pecuniary damages for additional stress and loss of a chance of reducing this stress by extended vacation. The distinction between *dommage* or *damnum* and *préjudice* or *praejudicium* makes sense in this context: the »damnum« was the damage to the car. The »préjudice« or recoverable damage consists in the cost of towing and repair plus incidentals such as rental of a replacement vehicle as far as pecuniary damage is concerned. It may also include some additional non-pecuniary damage, compensation of which may possibly help the victim afford some limited extra good time, which after all may be fair in the circumstances. Granting the full cost of the additional vacation week as compensation of pecuniary damage would not be right because the expense was not incurred, the victim as it were being caused to save money.

C. The principle of full compensation

1/107 Compensation of real and calculable damage calls for limited comment from a French perspective. Though the Civil Code makes no provision, the idea of full restoration (reparation in kind) or full compensation (by equivalent, in the form of damages) is a fundamental principle of compensation law[210]. Also, damages have to be assessed regardless of the degree of fault causing the damage[211].

1/108 The case of unwanted birth troubles French scholars[212] as much as it does other Europeans[213]. The birth of a child does not in itself constitute damage, a solution proclaimed both by administrative[214] and ordinary courts[215]. However, both sets of courts accept that compensation may be possible in exceptional circum-

209 See on this point *le Tourneau,* Droit de la responsabilité civile et des contrats[9] nos 1704 and 2545.
210 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 2521 ff.
211 »L'évaluation du dommage doit être faite exclusivement en fonction du préjudice subi«: Cass Civ 2, 21 July 1982, Bull Civ II, no 109; Cass Com, 3 April 1979, Bull Civ IV no 125; *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 2522.
212 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 249-2.
213 Basic Questions I, no 5/39 ff.
214 Conseil d'Etat (CE), 2 July 1982, D 1984, 425 note *J.B. d'Onorio.* Administrative courts have jurisdiction when the medical procedure (abortion or sterilization) was performed at a public hospital.
215 Cass Civ 1, 25 June 1991, D 1991, 566 note *P. le Tourneau,* RTD Civ 1991, 753, observations *P. Jourdain*.

stances[216], or when special damage occurs in addition to the normal expenses generated by maternity[217].

1/109 The exception stems from the fact that it is not the birth and the onus of child rearing that generates the damage but special suffering linked to the birth of a particular child, such as pregnancy caused by rape or incest[218]. Administrative courts also accept that the birth of a handicapped or malformed child upsets normal life conditions and may therefore generate recoverable damage[219]. When caused by the tortfeasor or by medical malpractice, the child's handicap is to be compensated[220]. *Viney* is of the opinion that the mother should recover when in a situation of financial distress[221].

1/110 Last but not least, it is to be remembered that in the very famous and controversial *Perruche* case[222], the Plenary Assembly of the Court of Cassation accepted that the child had a cause of action and a right to compensation in the case of wrongful life. An anomaly had been misdiagnosed during pregnancy, the mother having made it clear, at an early stage of pregnancy, that she would rather abort than take the chance of having a handicapped child. She was compensated[223], but the action conducted on behalf of the child was more problematic, as it came down to compensation for the mere fact of being alive. The Court concluded, however, that the child was »entitled to compensation for the damage resulting from such handicap and caused by the established failure to perform« the duty to take due care when conducting the antenatal investigations, at a stage where pregnancy could still be legally interrupted[224]. Although the Court had characterised the handicap, rather than wrongful life, as the recoverable damage, public opinion was outraged[225]. Legislation overturned this ruling, a law of 2002 providing that »[n]o one may rely on damage caused by the mere fact of one's birth«[226] and making provision for coverage of major handicap by way of national solidarity rather than tort law in such cases.

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216 CE, 2 July 1982, above FN 214.

217 Cass Civ 1, 25 June 1991, above FN 215.

218 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 249-2.

219 CE, 27 September 1989, D 1991, 80, note *M. Verpeaux;* CE, 17 January 1990, D 1990, 254, Conclusions *B. Stirn*.

220 CE, 27 September 1989, above; Cass Civ 1, 10 July 2002, Bull Civ I no 197; see *Viney/Jourdain,* Les conditions de la responsabilité[3] no 249-3 insisting that causation must be clearly established.

221 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 249-2.

222 Cass Plén, 17 November 2000, D 2001, 332, notes *D. Mazeaud/P. Jourdain,* JCP 2001, II, 10438 Conclusions *J. Sainte-Rose* and note *F. Chabas*.

223 See the cases cited above.

224 Translated by *O. Moréteau,* France, in: K. Oliphant/B.C. Steininger (eds), European Tort Law: Basic Texts (2011) 89 f.

225 See *Viney/Jourdain,* Les conditions de la responsabilité[3] no 249-6, defending the Court ruling, even on the ground of causation.

226 Art 1, Law no 2002-303 of 4 March 2002, dealing with the rights of medical patients and the quality of the health care system; *Moréteau* in: Oliphant/Steininger (eds), European Tort Law: Basic Texts 90.

II. Causation

1/111 Civil Code provisions regarding delictual liability are silent on causation, only making it a requirement by the repeated use of the verb »cause«[227]. More is said in provisions regarding contractual liability, found to be applicable to contractual and extra-contractual liability[228]. Art 1151 provides: »Even in the case where the non-performance of the agreement is due to the obligor's intentional fault, damages may include, with respect to the loss suffered by the obligee and the profit which he has been deprived of, *only what is an immediate and direct consequence* of the non-performance of the agreement.« This is rather vague language, much like what is to be found in other Romanist codes: the Civil Code of Poland limits liability to damage that is the *normal* consequence of wrongful action or omission[229]; Italy refers by analogy to the Penal Code, saying that subsequent causes break the causal link between a former cause and the damage, when they suffice on their own to explain the damage[230]; Portugal refers to the »conditio sine qua non«[231]. In France, much like in all Romanist systems, one must refer to jurisprudence. Rather than finding inspiration in complex doctrinal developments, French courts adopt a pragmatic approach and find ways to get around complex problems.

A. Causation in doctrine: a complex debate

1/112 The concept of »cause« is primarily philosophical. However, philosophical or scientific definitions of causation are of little use in the legal world. Whereas philosophers and scientists try to move up from known or observed phenomena to unknown causes, jurists try to determine a causal link between two known facts, the damaging event and the actual damage[232]. Causation is abundantly discussed in French doctrine[233]. However, French scholars shy at giving a definition of legal cau-

227 Art 1382: »Any act whatever of man, which *causes* damage to another, obliges the one by whose fault it occurred, to compensate it.« Art 1383: »Everyone is liable for the damage he *causes* not only by his intentional act, but also by his negligent conduct or by his imprudence.« Art 1384: »A person is liable not only for the damage he *causes* by his own act, but also for that which is *caused* by the acts of persons for whom he is responsible, or by things which are in his custody.« See *Moréteau* in: Oliphant/Steininger (eds), European Tort Law: Basic Texts 85 ff.

228 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 348.

229 Art 361 Civil Code, cited in *Viney/Jourdain,* Les conditions de la responsabilité[3] no 348.

230 Cited by *Viney/Jourdain,* Les conditions de la responsabilité[3] no 348.

231 Ibidem citing *A.M. Honoré,* International Encyclopedia of Comparative Law, vol XI, chapter 7 (1982) no 46.

232 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 333.

233 *G. Marty,* La notion de cause à effet comme condition de la responsabilité civile, RTD Civ 1939, 685. Causation is discussed in a large number of doctoral dissertations, and in all books on »responsabilité civile«: see references in *Viney/Jourdain,* Les conditions de la responsabilité[3] 332 f.

sation and prefer a common law inspired pragmatic approach, if one were to cite *Tony Honoré*[234]. *Ripert* wrote that »causation has been the object of brilliant doctrinal studies that never brought a solution to this general problem, which may never be solved«[235]. *Starck* and *Esmein* agreed that causation resists academic analysis[236]. *Honoré* insists that the doctrine of risk has marked France more than any other jurisdiction, the French proposing risk not only as a substitute to fault but also to causation[237]. *Viney,* however, is of the opinion that risk analysis has a limited impact in jurisprudence[238]. The doctrine of Aquilian relativity has had a greater impact. It is policy oriented and based on objective analysis of the norm to be applied; it insists on the determination of the damage that it wants to compensate[239]. The Criminal Chamber of the Court of Cassation has endorsed this approach, for instance by refusing compensation to alleged victims when a criminal law aims at protecting a general interest rather than private individuals[240]. French scholars tend to resist the Aquilian solution noting that it is as difficult to operate as causation itself[241].

Influenced by Germanic doctrines[242], French scholars managed to clarify some **1/113**
aspects of causation. Two conceptions of causation have been particularly influential. According to a first doctrine, damage is caused by a number of events, stemming from human action or inaction as well as external circumstances. From the moment any of these events appears to be a conditio sine qua non of the damage, it is to be regarded as a cause. Naturally, irrelevant causes may be ignored. This doctrine is known as *equivalency of conditions* (équivalence des conditions)[243]. It is criticised by those who favour proximity (proximité des causes) and believe that causation is only to be found in the most closely connected event, which may be decided on the basis of time factors, efficiency in producing the damaging result, probability, or foreseeability[244]. However, the notion of »causa proxima« is not very successful in France, nor are doctrines of efficient causation or direct causation[245].

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234 *Honoré,* International Encyclopedia of Comparative Law, vol XI, chapter 7. See also *K.L.A. Hart/T. Honoré,* Causation in the Law[2] (1985).

235 *G. Ripert,* note D 1945, 237.

236 *B. Starck,* Droit civil, Obligations[1] (1972) no 747; *P Esmein,* Le nez de Cléopâtre ou les affres de la causalité, D 1964, chr 205.

237 *Honoré,* International Encyclopedia of Comparative Law vol XI, nos 49 f and 94–96.

238 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 336.

239 *J. Limpens,* La théorie de la relativité aquilienne en droit comparé, in: Mélanges offerts à R. Savatier (1965) 539; *D. Philippe,* La théorie de la relativité aquilienne, in: Mélanges Roger O. Dalcq (1994) 467.

240 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 336.

241 Ibidem.

242 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 338.

243 Inspired by the German *von Buri,* this doctrine was exposed by *P. Marteau,* La notion de causalité dans la responsabilité civile, Aix-en-Provence (1913).

244 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 340.

245 Ibidem.

1/114 An equally popular doctrine is that of adequacy of causation (causalité adéquate)[246]. Among several causes, only the one that carries the objective possibility of the result may be regarded as the legal cause. This is based on some objective necessity, and presupposes an examination of the findings in the light of science and experience[247]. This doctrine has the advantage of avoiding the dilution of causes: indeed, equivalency of conditions seems to imply that each condition by itself is nothing, causation existing in their conjunction. However, its focus on the likelihood and foreseeability of damage may cause the judgment to be more normative and to drift away from factual causation. It has a strong normative overtone that may lead to some confusion between causation and fault[248].

1/115 Neither doctrine is fully satisfactory either in logic or in practice. Equivalency of conditions seems to be preferable when it comes to determining whether causation exists as a matter of fact, but adequacy of causation may be more helpful when it comes to proof[249]. Equivalency of conditions is more factually exact in the sense that likely or foreseeable damage does not necessarily occur (we may have fault and adequate causation and yet no damage ensues), whilst on the other hand, because of an unfortunate combination of causes, a normatively normal situation may lead to catastrophic harm. A fact necessary to the occurrence of harm must have contributed to causation. Foreseeability or probability may be signs of causation, whereas necessity establishes what one wants to prove, making the mere signs useless[250]. However, a party will not be made liable just because the causal link is necessary; it needs to be an apt way to explain intellectually why the damage occurred, as a consequence of fault or defect in a thing[251]. When it comes to proving the existence of causation, there are countless situations where it is almost impossible to say that without the occurrence, the damage would not have happened. *Viney* and *Jourdain* give several examples[252]. When a patient sees his condition worsen, are we sure that it is caused by the alleged medical negligence? Can we say for sure that a disease is caused by the vicinity of a nuclear plant, or that a car would not have been stolen had it been locked properly, since after all it is not that difficult to steal a locked car? Presumptions are used in these cases, based on probability and foreseeability, adequacy of causation thus taking the lead. Moving from theory to practice, the approach becomes pragmatic.

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246 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 343.
247 Basic Questions I, no 5/60.
248 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 344.
249 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 345.
250 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 346.
251 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 346-1.
252 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 347.

B. Causation in jurisprudence: a pragmatic approach

1/116 The French Court of Cassation checks how lower courts apply causation, rightly refusing to consider it a pure question of fact that could be left to the discretion of lower courts. Doctrinal discussions indicate how causation connects facts to normativity. The only aspect in relation to which the Court of Cassation occasionally defers to the discretion of lower courts is proof of causation[253], which does not mean that the highest Court abandons all review power regarding proof[254]. In recent cases the Court of Cassation has insisted that proof of causation may be induced from facts and circumstances wherefrom judges may infer presumptions, typically in cases of medical malpractice where matters get scientific and technical[255].

1/117 Many cases may be cited where the Court of Cassation exerts its review powers[256]: it acts in a very pragmatic manner, avoiding making pronouncements by way of general rule or giving general statements[257]. *Viney* and *Jourdain* observe that it takes careful analysis and comparison of the many cases in order to understand the content and contours of rules governing causation[258]. They note that the task is complicated by the fact that the Court tends to merge its judgment on fault and causation, especially when it asserts that lower judges »may have found (or not found) the existence (or absence) of fault and causal link with the damage.«[259] This is another area where the brevity of the highest Court pronouncements does not help the interpreter, but makes room for needed practical adjustments.

1/118 French courts will exclude liability every time it can be proved that without the alleged fact, the damage would nonetheless have occurred[260]. However, the fact will be accepted as a cause when it made the damage more serious (aggravation du dommage)[261]. To be a cause, the event must have contributed to the occurrence or aggravation of damage. As a rule, all conditions necessary to such occurrence or aggravation may be regarded as causal. The fact that an external cause also intervened does not prevent the liability of the tortfeasor, provided that

253 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 349 note 51 cite several cases, including Cass Civ 2, 14 June 1995, Bull Civ II, no 187.

254 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 349.

255 Cass Civ 1, 26 September 2012, Bull I no 187, commented by *Moréteau* in: Oliphant/Steininger (eds), European Tort Law 2012, 229, nos 20–26. Cass Civ 3, 18 May 2011, Bull III no 80, commented by *Moréteau* in: Oliphant/Steininger (eds), European Tort Law 2011, 216, nos 12–22.

256 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 349, notes 53 and 54.

257 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 350.

258 Ibidem.

259 Ibidem, in fine.

260 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 353 and the multiple cases cited where courts apply »conditio sine qua non«.

261 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 353-1, citing Cass Civ 1, 29 January 1985, Gaz Pal 1985, 1, 264, where, due to the fault of a hotel manager, a fire of unknown origin was allowed to propagate and harm the victims.

his act was also a conditio sine qua non. In the famous case of the sinking of the Lamoricière steamer[262], the ship-owner who was at fault for using poor-quality coal during a storm at sea was partly exonerated (by 4/5) due to the tempest that contributed to the damage. More recent cases rejected exoneration in similar circumstances, making the tortfeasor fully liable (responsabilité intégrale), in cases where the outside circumstance was predictable and resistible, falling short of constituting *force majeure*[263].

1/119 When several causes occur successively, French jurisprudence is not driven by the idea of proximate cause[264]. Cases may be found, however, where the closest cause in time is regarded as triggering full liability, such as in a case where the ambulance transporting a victim injured in a first accident gets involved in a second car crash causing the victim's death: the pre-existing condition was not taken into account and the second driver was made fully liable[265]. In more complex cases with multiple causes, fault seems to prevail over causation. This was certainly the case in a situation where two drivers, one of whom was in a state of intoxication, were racing against one another on a public highway[266]. While the inebriated driver was passing another car, the second »racer« overtook from third position and collided with his adversary's car, which he was overtaking, and with a third vehicle coming towards him. The accident resulted in a number of deaths and injuries, notably involving the passengers in the defendants' cars and one of the two »racers«, who was himself killed. Criminal proceedings were brought against the surviving »racer«, while the victims had their civil case for damages heard by the criminal court. The Court of Appeal found the defendant not guilty on the grounds that it was difficult to establish a causal relationship between his behaviour and the harm caused. The judges reasoned that the surviving negligent driver had overtaken more »normally« than his adversary, who then collided with him, and had been »led on« by his friend's attitude.

1/120 The Court of Cassation did not accept these arguments. The court found that the defendant's various violations of the Highway Code had a »global character« that »automatically applied to the indivisible interlinking of the acts described«.

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262 Cass Com, 19 June 1951, Sirey (S) 1952, 1, 89 note *R. Nerson,* D 1951, 717, note *G. Ripert,* RTD Civ 1951, observations *H. Mazeaud*.

263 Cass Civ 2, 30 June 1971, Bull Civ II, no 240 where all liability was placed on the driver based on custody of the car, in a case where the accident had been caused by the presence of ice on the road. See also *Viney/Jourdain,* Les conditions de la responsabilité[3] no 414. See also Cass Civ 2, 18 March 1998, Bull Civ II, no 97, commented in *B. Winiger/H. Koziol/B.A. Koch/R. Zimmermann* (eds), Digest of European Tort Law, vol I: Essential Cases on Natural Causation (2007) 6b/6, nos 1–9.

264 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 355 and the cases cited therein.

265 Cass Crim, 14 June 1990, Bull Crim, no 244, commented in *Winiger/Koziol/Koch/Zimmermann* (eds), Digest of European Tort Law I 11/6, nos 12–16.

266 Cass Crim, 5 January 1988, Bull Crim, no 7, commented in *Winiger/Koziol/Koch/Zimmermann* (eds), Digest of European Tort Law I 5/6, nos 1–15.

The Court of Appeal should have considered »whether, by taking part in a dangerous activity and by creating through their unwiseness – even if it was not possible to determine the direct involvement of the acts carried out by each of them – a grave risk of which third parties were the victims, the two drivers had not committed a faute commune (»joint fault«) for which [the surviving »racer«] should therefore be assigned the consequences in terms of compensation.« The survivor should pay damages for the consequence of both drivers' joint actions, as »faute commune« gives rise to solidary liability under French law.

Likewise, when an accident is caused by a stolen car, in circumstances where **1/121**
the negligence of the owner facilitated the theft, the thief's fault will prevail over the negligence of the owner so that the thief's fault will be recognised as the cause of the damage[267]. Hence comes the concept of causal fault (faute causale) developed by *Dejean de La Bâtie,* strongly connecting fault and causation[268]. This takes us back to the idea of adequacy, which is also to be found in cases of no-fault liability. When the damage is caused by a thing in someone's custody, the causal role of the thing in relation to the damage is presumed when the thing was moving (eg damage caused by a bicycle), as it must have played some »active role« in producing the damage. When the thing is not in motion, one must prove that the thing was abnormal. In a recent case[269], the victim was injured as a consequence of stepping against the ten-centimetre high concrete curb separating the parking space from the pedestrian entrance of a shopping mall. The victim sued the owners of the mall on the basis of art 1384 para 1 of the Civil Code, alleging that the cause was the act of the curb, a thing that was in the owners' custody. The claim was dismissed and the Court of Cassation affirmed: the curb was in good condition, it was painted in white and was therefore visible to a normally careful person, and it was possible to reach the stores without walking over it. In conclusion, the curb played no active role in the fall of the victim. One may note that this almost comes down to deciding that there had been no causal negligence on the part of the owners of the mall. French liability for the act of a thing does not fully qualify as strict liability.

267 Among the many cases cited by *Viney/Jourdain,* Les conditions de la responsabilité[3] no 357, see Cass Civ 2, 10 January 1962, Bull Civ II, no 47, and Cass Civ 2, 21 March 1983, Bull Civ II, no 84 where the damage was caused by a stolen aircraft.

268 Cited by *Viney/Jourdain,* Les conditions de la responsabilité[3] no 358.

269 Cass Civ 2, 29 March 2012, no 10-27553, Bull II, no 66, commented by *Moréteau* in: Oliphant/Steininger (eds), European Tort Law 2012, 229, nos 56–59.

C. The attenuation of the causation requirement

1/122 In particular cases where there are multiple tortfeasors or uncertainty of causation, various doctrines are applied where the causation requirement is attenuated[270].

1. Multiple tortfeasors, concurrent and alternative causes

1/123 French jurisprudence does not accept that a victim may be undercompensated just because one or several of the tortfeasors may be unknown. For the sake of justice, French law also tries to avoid shifting the whole burden of compensation onto those tortfeasors who have been identified[271].

1/124 *Hunting accidents* provide a classical example. Some reverse engineering is needed to understand the law pertaining to compensation of victims of such accidents. Victims must be compensated and will be compensated. If no tortfeasor is identified, this will be done by a compensation fund[272]. If one hunter has been shooting, he may be held liable unless he can prove that his shotgun was pointed in another direction, shot another type of bullet, or that it was defective at the time. Liability may then fall onto other identified hunters or an application for compensation may be filed to the compensation fund. If several hunters may have caused the damage, they can be made liable under one of the following doctrines: fault-based liability (faute commune, faute collective), if acting as a group and guilty of a collective fault[273]; custody of the bullets when two guns shot simultaneously and at least two bullets hit the victim (gerbe unique)[274]; or collective or joint custody of the bullets, also triggering strict liability for the act of a thing under art 1384 para 1[275]. If only one hunter is identified, this hunter would most probably be made fully liable, and this would not be regarded as inequitable since every hunter must by law carry third-party liability insurance. If this hunter is uninsured or insolvent, recourse shall be had to the compensation fund.

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270 Basic Questions I, no 5/73 ff.

271 This discussion cites, often verbatim, *Moréteau* in: Gilead/Green/Koch (eds), Proportional Liability: Analytical and Comparative Perspectives 141.

272 A compensation fund was created in 1951 to compensate victims of automobile accidents where the tortfeasor cannot be identified. A law of 11 July 1966 extended the benefit of this fund to victims of hunting accidents where the tortfeasor cannot be identified.

273 Old line of cases starting in 1950. See Cass Civ 2, 2 April 1997, Bull II, no 112; see *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1724.

274 Cass Civ 2, 5 February 1960, D 1960, 365, note *H. Aberkane*.

275 Cass Civ 2, 9 October 1957, JCP 1957, 10308, note *R. Savatier*.

A scenario quite similar to the hunters' case can be found in a recent *DES* or *Distilbène* case[276]. A woman suffered vaginal cancer allegedly caused by the fact that her own mother had been administered diethylstilboestrol or DES during pregnancy. No evidence was found of the details of the treatment: no prescription, no medical record (the doctor who treated the mother had died, and the record had disappeared). However, experts ascertained that the claimant's pathology was the consequence of her mother taking DES while pregnant. In addition, the victim's parents certified that the mother had taken Distilbène at that time, a fact corroborated by other witnesses. The victim sued UCB Pharma and Novartis, two companies that had produced and marketed diethylstilboestrol in France at the time, one under the name of Distilbène, and the other one under the generic name. However, everyone used the name Distilbène at the time, even to describe the generic DES. The victim could not prove which of the two companies had produced the substance her mother had taken. The Court of Cassation ruled that each of the two defendants had to prove that its product had not caused the damage, thereby creating a rebuttable presumption of causation. The two producers happened to supply the same commodity at the same time, rather than forming a group such as sports people or hunters in the typical cases. The judgment is based on the probability that one or the other of the two defendants caused the damage. It seems that the Court of Cassation decision is conducive of a 50-50 judgment, which may not be fair in the circumstances. At the time of the facts, UCB Pharma's market share was 80 to 90 %, leaving only 10 to 20 % to Novartis. Solidarity is not to be excluded, but Novartis's share should not exceed 20 %. **1/125**

Interestingly, the case may fall under two different provisions of the Principles of European Tort Law (PETL) regarding causation[277]. It may be regarded as a situation of concurrent causes. According to art 3:102, »In case of multiple activities, where each of them alone would have caused the damage at the same time, each activity is regarded as a cause of the victim's damage.« This leads to solidarity because we have multiple tortfeasors[278]. Art 3:103(2) (alternative causes) may be a better fit[279]: »In case of multiple activities, where each of them alone would have been sufficient to cause the damage, but it remains uncertain which one in fact caused it, each activity is regarded as a cause to the extent corresponding to the **1/126**

276 Cass Civ 1, 24 September 2009, Bull I, no 187, D 2010, 49, note *P.B.,* RTD Civ 2010, 111, observations *P. Jourdain;* commented by *Moréteau* in: Koziol/Steininger (eds), European Tort Law 2010, 175, nos 29–37, largely reproduced (often verbatim) in the present text.

277 Also discussed by Basic Questions I, no 5/84 f, though in the context of insolvency.

278 The case falls under art 9:101(1) (b) PETL: (1) »Liability is solidary where the whole or a distinct part of the damage suffered by the victim is attributable to two or more persons. Liability is solidary where … (b) one person's independent behaviour or activity causes damage to the victim and the same damage is also attributable to another person«.

279 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1732-2, discusses the case under »alternative causation«.

likelihood that it may have caused the victim's damage.« The European Group on Tort Law agreed that in cases of mass torts the burden of proof should not be too heavy on the victim[280], which is precisely what the Court of Cassation is considering when creating a presumption of causation. The Court did not rule on whether liability is joint or solidary. Logically, alternative causation excludes solidarity[281].

1/127 We do not know whether in the above case the victim's mother took medication manufactured by *one* producer only, which may be one or the other (alternative causes). She may have been treated with the product of one, and then with that of the other[282], during the time of the pregnancy, in which case we have concurrent causes. The good news is that both articles lead to the same solution, though the »alternative causes« provision is more conducive of proportional liability, which looks like the best solution in this case. The French Court of Cassation ruled in compliance with the Principles of European Tort Law, even before the publication of the French edition by the »Société de législation comparée«[283].

1/128 Another case decided by the same 1st Civil Chamber of the Court of Cassation, on 17 June 2010[284], confirms the willingness of the Court to rely on presumptions of causation. A man had contracted a nosocomial infection after having spent time in two different hospitals but it was impossible to prove in which hospital he had actually contracted the infection. The Court ruled that »where there is evidence of a nosocomial infection but the latter may have been contracted in several health institutions, each of those whose liability is sought has to prove that it did not cause the infection. »Though the facts are different, this is exactly what the Court ruled in the *Distilbène* case, in a case of alternative causes under the PETL[285].

1/129 In cases of multiple tortfeasors, French courts apportion the loss among the individual tortfeasors making them liable in solidum, and leave an uncompensated share to the victim based on his or her fault or negligence where he or she contributed to the damage. Where the individual share of each contributor cannot be identified, the court will apportion by virile share, dividing the whole amount by the number of contributors, each being liable in solidum. This applies to the example of a plaintiff attacked by several dogs, each belonging to a different owner. Unless one owner proves by exclusion that her dog is too small to have caused a major injury, the court will not be tempted to apportion otherwise. The fact that

280 Art 3:103 PETL, comment by *J. Spier* in: European Group on Tort Law, Principles of European Tort Law (2005) 49 no 9.

281 Solidarity implies a plurality of causes: *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1736. See also art 9:101(b) PETL.

282 Doctors sometimes shift to the generic form to save costs.

283 *O. Moréteau* (ed), Principes du droit européen de la responsabilité civile, Textes et commentaires, translation by *M. Séjean* (2011).

284 Cass Civ 1, 17 June 2010, Bull I no 137, D 2010, 1625 note *I. Gallmeister,* RTD Civ 2010, 567, observations *P. Jourdain,* JCP 2010, no 1015, Sirey (S) 1917, observations *C. Bloch*.

285 Art 3:103 PETL.

two out of the three dog owners are found negligent is irrelevant under French law. Liability is strict and is based on the ownership or use of the animal[286].

In asbestos cases, supposing that a victim worked five years with one liable employer and twenty years with another, the court may apportion on the basis of duration unless it can be shown that the sanitary situation was significantly worse with one or the other employer. The Court of Cassation will regard apportionment as a matter of fact and will not give a particular guideline[287]. **1/130**

2. Uncertainty of causation and loss of a chance

French courts routinely apply the doctrine of loss of a chance (perte d'une chance) whenever they are of the opinion that the defendant's activity deprived the victim of the opportunity of a favourable event when the victim can do nothing to remedy the situation. Loss of a chance is regarded as direct and certain damage. The French find it convenient to shift from causation to damage[288]. Rather than admitting that causation is partial or uncertain and follow a path similar to arts 3:101 to 3:106 PETL, French courts regard loss of a chance as a head of damage that will be fully compensated[289]. As unorthodox as things may look from a theoretical point of view, it serves very pragmatic purposes and has spread to other countries, both in the Romanist and Germanic branches of the civil law family[290]. **1/131**

Loss of a chance is frequently applied in cases of medical malpractice. As noted above[291], causation is tricky in medical malpractice cases due to scientific uncertainty. In a recent case[292], a child was born in a clinic with severe and multiple handicaps caused by a neurological disorder. The parents sued the general practitioner and the gynaecologist who monitored the pregnancy. They also sued the clinic where the mother delivered the child, together with the midwife, an employee of the clinic. All defendants were found liable in solidum for fault or negligence during the pregnancy and at the time of childbirth. They had proved that, unknown to the doctors at the time of the facts, the mother had a pre-exist- **1/132**

286 Art 1385: »The owner of an animal, or the person using it, during the period of usage, is liable for the damage the animal has caused, whether the animal was under his custody, or whether it had strayed or escaped« (translation Légifrance). See *Moréteau* in: Oliphant/Steininger (eds), European Tort Law: Basic Texts 85 ff.

287 *Moréteau* in: Gilead/Green/Koch (eds), Proportional Liability no 20.

288 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 370.

289 *Moréteau* in: Gilead/Green/Koch (eds), Proportional Liability no 2.

290 Basic Questions I, no 5/93 f.

291 Above no 1/115.

292 Cass Civ 1, 28 January 2010, Bull I, no 19, D 2010, 947, note *G. Maitre,* JCP 2010, no 474, note *S. Hocquet-Berg,* RTD Civ 2010, 330, observations *P. Jourdain;* commented by *Moréteau* in: Koziol/Steininger (eds), European Tort Law 2010, 175, nos 20–28, largely reproduced (often verbatim) in the present text. See also *Moréteau* in: Gilead/Green/Koch (eds), Proportional Liability nos 23–25.

ing condition that, in the opinion of experts, had a decisive but non-measurable influence on the handicap. However, the Court of Cassation concluded that the defendants' faults had in part caused the damage, thus justifying solidary liability for loss of a chance on the part of the child to experience a lesser degree of cerebral infirmity, »regardless of the degree of uncertainty of the first origin of the handicap.« Based on the judgment of the lower court, the victims were therefore to receive 75 % compensation.

1/133 This is a typical example where to some extent, but to an unknown extent, the loss derives from the victim's sphere, since the mother had been suffering from a pre-existing condition. The point was discussed at length by the European Group on Tort Law. According to art 3:106 PETL, »The victim has to bear his loss to the extent corresponding to the likelihood that it may have been caused by an activity, occurrence or other circumstance within his own sphere. »The Comments give the example of a medical malpractice case with a victim falling seriously ill, where »the illness may well have a ›natural‹ cause. The doctor is liable to the extent his malpractice may have caused the illness.«[293]

1/134 Applying the doctrine of the loss of a chance to our case leads to a similar result. Rather than lamenting on an unorthodox use of loss of a chance[294], one cannot but trust judges to make a reasonable assessment as to the percentage of liability to be assigned to the defendant, when challenged with inconclusive evidence. In such doubtful cases, proportional liability is no doubt to be preferred to an »all-or-nothing« approach. French pragmatism favours fiction over reliance on firm legal doctrine.

1/135 French law only allows for the compensation of a loss that is actual and certain[295]. The compensation of uncertain future loss is not permissible unless regarded as a loss of a chance[296]. French doctrine has identified two types of future losses[297]. The loss is virtual (préjudice virtuel) where it potentially exists as a consequence of the blameworthy conduct: all the conditions for its existence in the

293 Art 3:106 PETL, comments by *Spier* in: European Group on Tort Law, Principles of European Tort Law 58 no 13.

294 See *P. Jourdain,* RTD Civ 2010, 330.

295 The following paragraphs reproduce *Moréteau* in: Gilead/Green/Koch (eds), Proportional Liability nos 26–30.

296 The Court of Cassation accepts, in certain circumstances, that compensation be made conditional: a patient diagnosed with HIV after a faulty blood transfusion was awarded conditional damages, with payment subject to medical evidence that he developed AIDS as a consequence of contamination: Cass Civ 2, 20 July 1993, Bull Civ II, no 274, RTD Civ 1994, 107, observations *P. Jourdain.* Likewise, where the sale of an immovable is nullified partly as a consequence of the notary's fault, the notary is under no obligation to compensate the buyer unless the latter proves that he failed to obtain restitution of the price from the seller, which again, makes compensation conditional: Cass Civ 1, 29 February 2000, Bull Civ I, no 72, RTD Civ 2000, 576, observations *P. Jourdain*.

297 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1414.

future already exist at the time of the facts, much like an embryo contains all the elements necessary for the development of a human life. The loss is hypothetical (préjudice éventuel) where its existence depends on events that may or may not occur, much like the eventuality of a human being coming to exist when two persons of the opposite sex and able to procreate have intimate intercourse. If a CEO is prevented from concluding a promising contract because of an accident, the loss of benefit is regarded as hypothetical, since no-one knows whether the contract would have been concluded had the CEO not been prevented from conducting the negotiation[298]. The line is thin however, and one may want to decide that the CEO was presently and certainly deprived of a favourable opportunity, which is the test to decide whether a loss of a chance exists according to the most recent jurisprudence[299].

A loss has to be virtual, not hypothetical, in order to be compensated as a loss of a chance. This may happen in cases where the occurrence of any future harm is uncertain, but also where the scope of the future harm is uncertain. Rather than considering the harm complained of and addressing uncertain causation, the French take for granted that the perpetrator deprived the victim of the possibility of an uncertain advantage and gain and regard this lost chance as damage. **1/136**

In the example of the CEO who was prevented from concluding a promising contract due to an accident, the occurrence of future harm is uncertain: nobody can tell for sure that the deal would have been concluded. French law applies a form of proportional liability whenever judges find that the plaintiff was presently and certainly deprived of a favourable opportunity. As explained above, compensation will be apportioned in the sense that it will be calculated as a share of the plaintiff's various heads of damage. **1/137**

The compensation of loss of a chance in such situations has caused no unreasonable surge in litigation. On the other hand, compensation of loss of a chance has caused no known increased deterrence in the exercise of professional activity such as legal or medical practice. In dubious cases, courts are more than likely to describe the loss as hypothetical and reject the claim, as eventually happened in the CEO case. **1/138**

Cases in which harm has already been caused but the scope of this harm in the future is unknown are common. All cases where a victim suffers personal injury causing some form of disability seem to fall into this category. The loss of vision in an eye, the limitation in the use of an arm, or the loss of the ability to procreate, is no doubt existing harm. However, the scope of the loss for the future is unknown. The young person losing the opportunity to procreate may elect for a lifestyle where this causes no impediment or may be deprived of the chance of **1/139**

298 Cass Civ 2, 12 June 1987, Bull II, no 128, RTD Civ 1988, 103, observations *J. Mestre*.
299 See the discussion of Cass Civ 1, 28 January 2010 (FN 292) and accompanying text above.

raising a small or larger family. Such unknown harm can be described as virtual since the condition exists at the time of the harm. It may be repaired as a loss of a chance.

1/140 However, French courts are likely to indemnify such loss as »préjudice d'agrément«. This may cover the loss of a precise activity such as the possibility to do sports or to play the violin, in situations where the victim had already some practice[300]. However, *Geneviève Viney* voiced concern that such a narrow understanding of the préjudice d'agrément would be »elitist«[301], expressing support for its extension to the general arrangement of a normal life, as sometimes defined by the courts[302]. This is a form of non-pecuniary damage, the assessment of which is of course problematic, and will never be fully adequate in the parties' eyes.

300 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1586.

301 *G. Viney,* Responsabilité civile (Chronique d'actualité), JCP 1995, I, 3853, no 22.

302 Cass Crim, 2 June 1964, D 1964, 629 (»joies légitimes que l'on peut attendre de l'existence«); Cass Crim, 5 March 1985, Bull Crim, no 105, D 1986, 445, note *H. Groutel* (»privation des agréments d'une vie normale«).

Part 6 The elements of liability

I. Wrongfulness and fault under French law

From a French perspective, wrongfulness does not appear as an external requirement in addition to fault, but as an element of fault. Unlike the Italian Civil Code, which under Germanic influence expressly requires wrongfulness as a condition for liability in addition to fault[303], the French Civil Code requires the existence of fault without making reference to wrongfulness[304]. When discussing fault, authors traditionally consider that it includes an objective element (illicéité, meaning wrongfulness) and a subjective one (imputabilité, meaning a moral element)[305]. Recent developments lead to doubt as to the relevance or usefulness of the subjective element, now that the law accepts that infants and mentally ill people may be liable for wrongful acts. A doctrine of objective fault has developed, leading to confusion: in the opinion of some scholars, fault comes to mean wrongfulness, or wrongfulness becomes the only element of fault[306]. Whatever language is used in describing the matter, this indicates that wrongfulness is and remains the core element of fault-based liability. **1/141**

Wrongfulness also remains an important element of no-fault liability for the act of a thing under one's custody and liability for others[307]. This statement may sound unacceptable or at the very least questionable from the pen of a French-educated scholar and would be circled in red on a student exam paper. Since, according to the French, wrongfulness is depicted as an element of fault, how could it play a role in no-fault liability? This is where comparative law helps elucidate the mysteries of one's own legal system. We will see that wrongfulness plays a key role in this context, though in an indirect manner. **1/142**

303 Art 2043: »Any negligent or intentional conduct which wrongfully interferes with a protected interest obliges whosoever has caused the harmful event to pay for damages.« *E. Bargelli,* Italy: in: K. Oliphant/B.C. Steininger (eds), European Tort Law: Basic Texts (2011) 135.

304 Art 1382: »Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.« Art 1383: »Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence.« *Moréteau* in: Oliphant/Steininger (eds), European Tort Law: Basic Texts 85.

305 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 442 f; *Fabre-Magnan,* Droit des obligations, Responsabilité civile et quasi-contrats[2] 87–98.

306 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 6716 f.

307 Art 1384 para 1: »A person is liable not only for the damage he causes by his own act, but also for that which is caused by the acts of persons for whom he is responsible, or by things which are in his custody.«

A. Wrongfulness as the core element of fault

1/143 Traditionally, fault is said to imply the existence of an act or omission that must be wrongful (illicite) and attributable (imputable) to the actor[308]. It includes an objective element consisting in the violation of a duty or a legal obligation, and a subjective element, that some call guilt (culpabilité) and others imputability (imputabilité), this latter term indicating that the act is psychologically attributable to the tortfeasor[309]. There is a huge amount of literature and controversy around these notions, and recent developments in French law did not help to make matters any clearer. Rather than opening the debate and taking sides, this section will focus on core notions and will propose an outside analysis of contemporary evolutions.

1. The permanence of the objective element

1/144 *Planiol* defined fault as »the violation of a pre-existing obligation«[310], a definition that serves as the starting point of all discussion on the subject. He was the first French voice insisting on the illicit dimension and the idea of breach of a duty[311]. Though the French Civil Code does not expressly require the existence of a duty of care, it is commonly admitted that fault means either the breach of a statutory duty[312] or the infringement of more general duties, such as the duty to behave, in all circumstances, in a careful and diligent way (devoir général de prudence et de diligence)[313]. In this regard, violation of *any* mandatory legislative provision is regarded as fault under French law, and this is particularly true whenever criminal punishment is provided for[314]. This does not mean that French law differs from Germanic systems in this respect, as fault is here regarded as a synonym of wrongfulness, with a focus on the objective element only[315]. If the subjective element failed, there would be no criminal offence anyway, since criminal offences only exist when, in addition to the legal element (nullum crimen, nulla poena sine lege), the material element combines with the moral element, which may be intent or negligence.

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308 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 442.
309 Ibidem.
310 *M. Planiol,* Traité élémentaire de droit civil[11], vol 2 (1939) no 863: »La faute est *un manquement à une obligation préexistante…*«.
311 *Puech,* L'illicéité dans la responsabilité civile extra-contractuelle (1973).
312 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 447 f.
313 *S. Galand-Carval,* Fault under French Law, in: P. Widmer, Unification of Tort Law: Fault (2005) no 10.
314 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 448.
315 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 6716.

We may say that such violations are wrongful *per se,* and therefore constitutive of fault, though it would be more accurate to say that they constitute *wrongfulness,* triggering liability only where the subjective element is present, except in those cases where the law dispenses with the requirement for subjective elements, such as cases of damage caused by infants and mentally ill people. **1/145**

Likewise, the infringement of clearly defined subjective rights is regarded as fault, especially where such rights are strongly protected[316]: this applies to personality rights[317] and to property rights[318]. The Court of Cassation regards the violation of such rights, which is wrongful in essence, either as fault (citing art 1382), or as the violation of a subjective right, citing the provision serving as a foundation for such right (art 9 regarding protection of privacy, art 544 regarding ownership)[319]. These clearly describe wrongfulness (illicéité), which is purely objective, even where courts and authors prefer to talk about fault. The violation of a pre-existing duty, or the infringement of an existing right, characterises the illicit element (wrongfulness). French law does not require proof of a subjective element (imputability) when a fundamental right is encroached, which may be reasonable given the priority accorded to such rights. The doctrinal recognition of the existence of personality rights[320], followed by the recognition of the protection of privacy in the preliminary title of the Civil Code[321], helped clarify this part of the law. Judges no longer need to refer to art 1382 to sanction infringements of privacy, and do not search for the existence of imputability: wrongfulness is sufficient when personality rights are infringed, and reference to art 9 suffices. There is no need to prove fault, not even to prove the existence of damage[322], proof of infringement of the right already opening a right to redress[323]. Further additions were made to the Civil Code, establishing new situations where courts may find support for direct protection of human dignity, the human body and its elements[324]. **1/146**

316 *J. Deliyannis,* La notion d'acte illicite (doctoral thesis 1951) 82 f, cited by *Viney/Jourdain,* Les conditions de la responsabilité[3] no 449.

317 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 449.

318 Ibidem.

319 Ibidem citing Cass Civ 1, 5 November 1996, Bull Civ I, no 378; Cass Civ 1, 25 February 1997, Bull Civ I, no 73; Cass Civ 3, 25 February 2004, Bull Civ III, no 41, all cases relating to infringements of privacy.

320 *Nerson,* Les droits extra-patrimoniaux (1939).

321 Art 9 (Law no 70-643 of 17 July 1970): »Everyone is entitled to the respect for his private life. Without prejudice to compensation for actual damage, the court may prescribe any appropriate measures, such as sequestration, seizure and others, to prevent or end an invasion of intimacy of private life; in case of emergency those measures may be ordered by interim injunction.«

322 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1618.

323 Cass Civ 1, 5 November 1996, Bull Civ I, no 378, RTD Civ 1997, 633, observations *J. Hauser*.

324 Art 16 (Law no 94-653 of 29 July 1994): »Legislation ensures the primacy of the person, prohibits any infringement of the latter's dignity and safeguards the respect of the human being from the outset of life.« Art 16-1 (Law no 94-653 of 29 July 1994): »Everyone has the right to respect for his body. The human body is inviolable. The human body, its elements and its products may not be the object of a patrimonial right.«

1/147 Non-French readers would expect judges to adopt a balancing of interests approach when discussing the infringement of such fundamental rights, since it typically coincides with the exercise of another equally protected right on the part of the actor. For instance, protecting personality rights such as privacy and the right to one's image may impose restrictions on freedom of information or the freedom of the press. The French do not view things that way. The media may not tamper with personality rights without previous authorisation by the individual, and such authorisation is never presumed and it is interpreted restrictively[325]. These rules apply to public figures such as rock stars or politicians as well as to ordinary citizens, the law conferring the same protection on everyone[326]. Courts do decide, however, that there is nothing wrong in revealing innocuous facts such as the birth of a fourth child of Princess Caroline de Monaco[327]. The image of a public figure (and this applies also to anonymous members of the public) is not protected when taken in a public place where such person performs a professional or public duty[328], subject to the informative character of the image[329]. But when it comes to privacy, the general public cannot claim to have a right to be informed of, for instance, the extramarital liaisons of the President of the Republic, since this is regarded as a strictly private matter[330].

1/148 Likewise, art 9-1 strengthens the protection of the presumption of innocence[331], making the publication of the photo of a handcuffed person a criminal offence[332], though the public has a right to be informed of criminal proceedings against public figures. The French were shocked when former Finance Minister, then IMF Director, Dominique Strauss-Kahn, was filmed and photographed handcuffed as he was arrested and prosecuted for the alleged rape of a maid on 13 May 2011, in a Man-

325 CA Paris, 14 May 1975, D 1976, 292 *(C. Deneuve* case). See *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1624.

326 See art 9 Civil Code above (FN 321).

327 Cass Civ 1, 3 April 2002, Bull Civ I, no 110, D 2002, 3164, note *C. Bigot*.

328 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1635.

329 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1642.

330 The double life of the former President Mitterrand was not discovered until the day of his funeral, when his illegitimate daughter Mazarine Pingeot followed the funeral procession. More recently, President François Hollande refused to comment publicly on his private affair with actress Julie Gayet that caused France's first lady to leave the Élysée palace.

331 Art 9-1 Civil Code (Law no 93-2 of 4 January 1993): »Everyone has the right to respect of the presumption of innocence.« (Law no 2000-516 of 15 June 2000): »Where, before any sentence, a person is publicly shown as being guilty of facts under inquiries or preliminary investigation, the court, even by interim order and without prejudice to compensation for damage suffered, may prescribe any measures, such as the insertion of a rectification or the circulation of a communiqué, in order to put an end to the infringement of the presumption of innocence, at the expenses of the natural or juridical person liable for that infringement.«

332 Art 35, Law of 29 July 1881 on the freedom of the press, as modified by Ordinance no 2000-916 of 19 December 2000.

hattan luxury hotel[333]. Tampering with the presumption of innocence is viewed as an infringement to a person's honour, characterised as a personality right, hence under strict protection[334]. However, a careful study of court decisions shows that freedom of the press is not completely sacrificed. The simple fact of revealing the identity of a person charged with a crime is not prohibited, so long as there is an absence of words clearly showing prejudice against the accused[335].

1/149 This leaves one remaining issue. What about the infringement of more general duties, such as the duty to behave, in all circumstances, in a careful and diligent way (devoir général de prudence et de diligence)? The beauty of the general clause enshrined in art 1382 lies in the dispensation from looking for existing texts or pre-existing special torts, as was the case under Roman law and ancient law. The standard, however, is borrowed from Roman law, as French courts traditionally refer to the *bonus pater familias* (bon père de famille), mentioned in several articles of the Civil Code[336]. The *good family father* represents »the normally prudent and diligent person, who is neither extremely vigilant, nor abnormally negligent, neither a hero nor a coward, neither a pure egoist nor an exceptional altruist, but between the two: an ordinary human being.«[337] Comparison is often made with the common law reasonable man, lately renamed the reasonable person[338]. Ecologists recently moved the French National Assembly to vote for the elimination of the »bon père de famille«-standard and its replacement by a reasonableness test, to eliminate an allegedly sexist reference[339]. The traditional test conveys the idea that people have to be mindful of their offspring's interest. Doing away with the reference to generation would eliminate the future-oriented dimension of the standard. The ongoing reform neglects the fact that the reference to parenthood is quite promising for the protection of the environment, the »reasonable person« language including no reference to future generations[340]. For the time being, it suffices to say that the Court of Cassation uses the »bon père de famille«-standard[341]. It is not used in a purely abstract way, but taking into account particular

333 Dominique Strauss-Kahn: sept jours pour une descente aux enfers, Le Monde.fr, 22 May 2011.

334 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1648.

335 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1649, citing Cass Civ 1, 10 October 1999, Bull Civ I, no 286.

336 See arts 1137 and 1880.

337 *Fabre-Magnan,* Droit des obligations, Responsabilité civile et quasi-contrats[2] 89 f. For full references, see *Viney/Jourdain,* Les conditions de la responsabilité[3] nos 462–472, and *N. Dejean de La Bâtie,* Appréciation in abstracto et appréciation in concreto en droit civil français (1965).

338 *Fabre-Magnan,* Droit des obligations, Responsabilité civile et quasi-contrats[2] 90.

339 Vote of 21 January 2014; see *O. Moréteau,* Faut-il éliminer le »bon père de famille« du Code civil? <http://jurexpat.blog.lemonde.fr/> (last visited 20.2.2014).

340 *O. Moréteau,* Post Scriptum to Law Making in a Global World: From Human Rights to a Law of Mankind, 67 Louisiana Law Review, 1223, at 1228 (2007). See also *O. Moréteau,* Le standard et la diversité, in: M. Bussani/M. Graziadei (eds), Law and Human Diversity (2005) 71.

341 Cass Civ 1, 7 July 1992, Bull Civ I, no 222.

circumstances so that it may be adjusted depending on age, professional capacity and expertise, etc[342], much in line with the required standard of conduct to be found in the PETL[343].

1/150 Acting in accordance with the rules (such as in sporting activities) does not necessarily shield the actor from liability, as judges can be of the opinion that the conduct did not match the standard of reasonableness and was therefore wrongful[344]. Likewise, the exercise of a subjective right may be deemed abusive (abuse of right; abus de droit), when the action happens to be malicious and unreasonable[345], even if the right in question is strongly protected[346]. The existence of malice or intentional fault brings us to the subjective element.

2. The retreat of the subjective element

1/151 The subjective element of fault resides in the actor's own awareness of his act[347]. French authors overwhelmingly recognise that fault necessarily includes a subjective element, described as a »moral« element by some and »psychological« by others[348]. Whatever word is used, this tradition goes back to Canon law[349], and derives from the philosophical foundations of civil liability and the notion of reason put forward by *Pothier* in the 18th century[350]. Full consciousness, together with the capacity of understanding what is being done, makes the act attributable (imput-

342 *Fabre-Magnan,* Droit des obligations, Responsabilité civile et quasi-contrats[2] 90 f, with sport-related examples.

343 Art 4:102: »(1) The required standard of conduct is that of the reasonable person in the circumstances, and depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods. (2) The above standard may be adjusted when due to age, mental or physical disability or due to extraordinary circumstances the person cannot be expected to conform to it.«

344 Cass Civ 2, 10 June 2004, Bull Civ II, no 296, RTD Civ 2005, 137 observations *P. Jourdain.* Conversely, a court may rule that there is no wrongfulness though the rules of the game have been infringed, which tends to be the case when the rule is technical in essence: Cass Civ 2, 13 May 2004, Bull Civ II, no 232.

345 The Civil Code of Quebec contains an excellent abuse of right provision, reflecting criteria perfectly acceptable under French law. Art 7: No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.

346 Such as the right of ownership: see the famous case *Clément-Bayard,* Cour de cassation, Chambre des requêtes (Cass Req) 3 August 1915, Dalloz Périodique (DP) 1917, 1, 79.

347 *Fabre-Magnan,* Droit des obligations, Responsabilité civile et quasi-contrats[2] 94.

348 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 444 cite *Savatier, Esmein, Rodière, Starck* and *Carbonnier*.

349 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 444.

350 *H.A. Schwarz-Liebermann von Wahlendorf,* Éléments d'une introduction à la philosophie du droit (1976).

able) to the actor[351]. This perception is consistent with a »free will« philosophical approach (libre arbitre). It still prevails in French doctrine and in public opinion, despite energetic doctrinal challenges starting from the 1930s. According to »objectivist« doctrines, wrongfulness is a sufficient element to characterise fault and imputability is not needed, with the consequence that legal entities can be at fault as much as natural persons[352]. Not surprisingly, objectivist authors tend to favour a doctrine of risk rather than fault as a foundation of tort law. One is answerable for the risk created (risque créé), or for the risk one benefits from (risque profit)[353].

Objective tendencies have gained ground in positive law. In 1968, a provision was **1/152**
added to the Civil Code, making people causing damage while suffering from mental disorders fully liable[354], whether liability is based on fault or not[355]. Courts have followed that lead, with the Plenary Assembly of the Court of Cassation ruling, in 1984, that young children deprived of discernment are liable for fault on the basis of art 1382, and also for damage caused by things under their custody under art 1384[356].

The advent of objective fault was wrongly described as the triumph of the ob- **1/153**
jectivist approach[357]. *Viney* and *Jourdain* propose a more careful explanation[358]. The highest French Court wanted to extend the legislative work done as regards damage caused by the mentally disordered to infants, for the sake of consistency. Both mentally disordered people and infants should be liable for their wrongful acts, regardless of lack of discernment. It is not certain, however, that such symmetry makes sense for practical purposes, and it comes as no surprise that the solution is severely criticised in doctrine. *Viney* rightly observes that it was a useless move, due to the impecuniosity of most children: it is much wiser to attach liability to their parents or caretakers[359]. If an action against children is allowed, it should be limited to the requirements of equity, taking into account the economic circum-

351 *Terré/Simler/Lequette,* Droit civil, Obligations[8] no 722.

352 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 444, citing *H.* and *L. Mazeaud, A. Tunc, G. Marty, P. Raynaud, N. Dejean de La Bâtie, F. Chabas, P. le Tourneau* as objectivist scholars.

353 *Viney,* Introduction à la responsabilité[3] no 49 f, citing *R. Saleilles* and *L. Josserand*.

354 Art 489-2 Civil Code (now art 414-3 by Law no 2007-308 of 5 March 2007), added by Law no 68-5 of 3 January 1968: A person who has caused damage to another when he was under the influence of a mental disorder is nonetheless liable to compensation (translation Légifrance).

355 Cass Civ 2, 4 May 1977, Bull Civ II, no 113, D 1978, 393, note *R. Legeais,* RTD Civ 1977, 772, observations *G. Durry*.

356 Cass Plén, 9 May 1984, JCP 1984, II, 20255, note *N. Dejean de La Bâtie,* D 1984, 525, note *F. Chabas,* RTD Civ 1984, 508, observations *J. Huet.* See *Viney/Jourdain,* Les conditions de la responsabilité[3] no 593.

357 *H.L.J. Mazeaud/F. Chabas,* Leçons de droit civil[8], vol 2.2 (1991) no 448. *H. Mazeaud,* La faute objective et la responsabilité sans faute, D 1985, chron 13.

358 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 593.

359 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 593. For a full discussion, see *L. Francoz-Terminal/F. Lafay/O. Moréteau/C. Pellerin-Rugliano,* Children as Tortfeasors under French Law, in: M. Martín-Casals (ed), Children in Tort Law I: Children as Tortfeasors (2006) nos 113–119.

stances of the parties, as in Germanic countries[360]. Generally speaking, parents take out liability insurance covering damage caused by children under their guard when they purchase homeowner insurance or insure leased property. Why then shift liability to the child, when the Civil Code already makes parents liable for damage caused by their children?

1/154 It may be tempting to conclude, like *Muriel Fabre-Magnan,* that the adoption of a concept of objective fault means the demise of the condition of imputability, that moral fault is gone, and fault under French law amounts to wrongfulness and nothing more[361]. However, this would extend a legislative and jurisprudential movement well beyond its intended and practical consequences. Though not devoid of logic, this conclusion denies the primarily pragmatic character of French law and the common sense of the French, who remain deeply attached to the moral notion of fault.

1/155 Imputability simply has a reduced scope, and tends to be presumed the moment wrongfulness is proved to exist. Fault has not shrunk to mean simply wrongfulness, except when it comes to protecting paramount rights such as property and personality rights, or in those few cases where *faute objective* is applied. Imputability remains a condition in the vast majority of cases decided on the basis of arts 1382 and 1383. Considered from a comparative perspective, French law is not at odds with other systems, as might appear at first sight. The French may say that fault includes wrongfulness and imputability (though in a reduced form), which is true from a French perspective. From an outside viewpoint, one may safely conclude that France has two sets of requirements for fault-based liability: wrongfulness (illicéité) and fault (imputabilité), the latter including intentional fault and negligence and being presumed in many cases.

B. The indirect role of wrongfulness in no-fault liability

1/156 No-fault liability gained much ground in French law in the wake of the *Jand'heur* case[362], confirming that liability for the act of a thing under one's custody is not based on the reversal of the burden of proving fault, exoneration being limited to proof of force majeure. It was extended by special legislation imposing strict liability for damage where a motor vehicle is implicated[363] or damage caused by a defective product[364]. This section will show that these developments did not make

360 § 829 BGB, § 1320 ABGB; Basic Questions I, no 6/11.

361 *Fabre-Magnan,* Droit des obligations, Responsabilité civile et quasi-contrats[2] 98.

362 Cass Réun, 13 February 1930, DP 1930, 1, 57, note *G. Ripert,* S 1930, 1, 121, note *P. Esmein.* See *Viney/Jourdain,* Les conditions de la responsabilité[3] no 632.

363 Law no 85-677 of 5 July 1985.

364 Law no 98-389 of 19 May 1998.

wrongfulness peripheral in French tort law. Even when drifting away from fault-based liability (the development of no-fault liability exerting a centrifugal force), French tort law rarely favours pure strict liability or absolute liability, these only existing under special legislation[365]. When founding liability on art 1384 and claiming that liability stems from the act of a thing under one's guard, French courts accept that liability may be reduced by the taking into account of the victim's fault (the consideration of the victim's fault exerting a centripetal force). Apportioning liability in such cases leads the courts to indirectly adopt a comparative negligence approach. This presentation will deviate from French traditional doctrine categorising liability for the act of a thing under one's custody as *no-fault liability* (responsabilité sans faute), showing how fault and wrongfulness are reintroduced in a subtle and indirect way.

1. The return of fault under hidden comparative negligence

Article 1384 deals with liability for others (parents for their children, employers for employees, etc)[366] and liability for damage caused by a thing (eg, animals, collapsing buildings)[367]. It starts with a paragraph that was meant to be introductory: »[a] person is liable not only for the damage he causes by his own act, but also for that which is caused by the acts of persons for whom he is responsible, or by things which are in his custody.« There is evidence that the drafters of the Civil Code never intended to give this sentence normative force, so much were they attached to founding liability on fault[368]. Yet, in 1896 *(Teffaine* case)[369], the Court of Cassation ruled that this paragraph contains an autonomous principle of liability for the act of a thing, creating an exception to art 1382 fault-based liability, as the party having custody of such thing could be liable based on some latent defect of the thing. In *Teffaine,* damage had been caused by the explosion of the defective engine of a tugboat. Attempts were later made to reduce the scope of the new doctrine to the »act of the thing« (explosion of a boiler, defective brakes in a car) from the »act of a man« (damage caused by the driver of a car). In the famous *Jand'heur* case, a child had been run over by a lorry. Lower courts excluded the application of art 1384, as the damage was not caused by a defect in the vehicle but by the act of the man behind the wheel. The Court of Cassation disapproved, insisting that the article does not distinguish whether the thing causing the damage had or had **1/157**

365 Such as strict liability in the case of road traffic accidents (Law no 85-677 of 5 July 1985) and product liability (Law no 98-389 of 19 May 1998).

366 Art 1384 paras 2 to 7 Civil Code.

367 Arts 1385 and 1386 Civil Code.

368 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 628. For an overview, see *F. Leduc* (ed), La responsabilité du fait des choses; réflexions autour d'un centenaire (1997).

369 Cass Civ, 18 June 1896, S 1897, 1, 17, note *A. Esmein,* D 1897, 1, 433, note *R. Saleilles*.

not been the result of an act by man[370]. From that time on, art 1384 was applied to all accidents caused by motor vehicles, simply based on the fact that a thing (the car) had been in contact with the victim, causing damage. Obviously, this solution no longer applies to road accidents, which are now subjected to the special regime of the law of 5 July 1985. However, art 1384 remains applicable to all other things, whether or not brought about by an act by man.

1/158 Once the act of the thing is established and the party having custody identified[371], the latter is liable, unless such proves that the damage was produced by some outside cause that qualifies as force majeure[372], meaning it must be unforeseeable and irresistible. This may be the act of a stranger or a fortuitous event, or an act of the victim[373]. Force majeure fully exonerates the party having custody. However, liability may also be reduced based on the fault of the victim, even when this is foreseeable and avoidable[374]. This means that liability may be apportioned, allegedly exclusively on the basis of the consideration of the victim's negligence. This applies to the fault of a lady accompanying a passenger and stepping off the train as it is already in motion and being injured by it[375], or to the act of a person who, having been denied access to a public place, violently pushes the glass door, causing it to break, and is injured by the act of the door[376]. One cannot openly talk about comparative negligence in such cases, as courts must refrain from discussing the fault of the party having custody in order to avoid cassation. However, one may fairly suppose that lower judges may be tempted to compare the degree of negligence of both parties. Whether this happens or not, these cases show that fault plays at least an indirect role in allegedly no-fault liability. The fact was patent before the adoption of the law of 1985 on road traffic accidents, when liability was based on art 1384. Insurance companies called on to intervene or those subrogated in the victims' place, used to litigate over the respective fault of each party in collision cases, causing liability to be apportioned in many cases[377].

1/159 This caused such an influx in litigation that, in the summer of 1982, the Second Civil Panel of the Court of Cassation ruled that the victim's fault could no

370 Cass Réun, 13 February 1930, DP 1930, 1, 57 note *G. Ripert,* S 1930, 1, 121, note *P. Esmein/L. Josserand,* La responsabilité du fait des automobiles devant les Chambres réunies de la Cour de cassation, Dalloz Hebdomadaire (DH) 1930, 25.

371 The owner of the thing is presumed to have custody of a thing, unless proving that someone else had the use, direction, and control of the thing at the time of damage: *Franck* case, Cass Réun, 2 December 1941, Dalloz Critique (DC) 1941, note *G. Ripert*.

372 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 702.

373 See cases cited by *Viney/Jourdain,* Les conditions de la responsabilité[3] no 702.

374 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 702, 426. Cass Civ 2, 8 March 1995, Bull Civ II, no 82.

375 Cass Civ 2, 23 January 2003, Bull Civ II, no 17, RTD Civ 2003, 301, observations *P. Jourdain*.

376 CA Besançon, 8 November 2010, JCP 2011, no 166.

377 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 702.

longer lead to partial exoneration, and was not to be taken into account unless unforeseeable and irresistible, in which case it caused full exoneration[378]. In this case, the two victims had crossed a four-lane thoroughfare at rush hour, without paying attention to oncoming traffic. Their presence on the street was found foreseeable, and the driver was found fully liable based on the custody of the vehicle. This case caused uproar and was severely criticised. It triggered the debate leading to the adoption of the law of 5 July 1985. Shortly after the adoption of the new law, the Court of Cassation retreated to its traditional jurisprudence, granting partial exoneration based on the victim's fault. This happened in a case where the victim, despite repeated warning, stood under a tree while the owner thereof was pruning branches with a chainsaw, and was injured by the fall of a branch[379], a case offering an ideal scenario for comparative negligence.

1/160 The Court of Cassation of Belgium takes a different approach. The very same art 1384 para 1 is only applied to damage caused by a defective thing. Proof of the defect, to be adduced by the victim, creates an absolute presumption of fault, which can only be defeated by the proof that damage was caused by an outside event[380].

2. The return of wrongfulness under the passive but abnormal role of the thing

1/161 Among the many debates regarding liability for the act of a thing, is the discussion as to whether the thing must have had an active role in causing damage. Some courts impose on the victim the burden of proof that the thing played an active role (rôle actif de la chose)[381] whilst others seem to presume this active role and allow the defendant to plead the passive role (rôle passif de la chose) as a defence[382]. The active role seems to be presumed when the thing is in movement or when it explodes[383].

1/162 When a thing is not in movement (chose inerte), it may nonetheless be held to have played an active role. Before the law of 1985, this was the case when a car was parked in an abnormal way, so that other divers may be surprised to find it where

378 *Desmares* case, Cass Civ 2, 21 July 1982, D 1982, 449 note *C. Larroumet,* JCP 1982, II, 19861, note *F. Chabas*.

379 Cass Civ 2, 6 April 1987, D 1988, 32, note *C. Mouly*.

380 *H. de Page,* Traité élémentaire de droit civil belge[2], vol 2 (1948) no 1002. On the Belgian origins of the French jurisprudence on liability for damage caused by a thing, see *Mazeaud/Chabas,* Leçons de droit civil[8], vol 2.2, no 514.

381 Cass Civ 2, 6 May 1993, Bull Civ II, no 168.

382 Cass Civ 2, 10 January 1985, Bull Civ II, no 9.

383 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 666.

it was[384]. The party having the custody of a staircase is liable based on art 1384 if it is proven that the steps were slippery or the staircase poorly lit up[385]. The Court of Cassation tends to request the evidence of some abnormal character of the inert thing that »caused« the damage. In a recent case[386], a victim was injured as a consequence of stepping onto a ten centimetre high concrete curb separating the parking space from the pedestrian entrance to a shopping mall. As the curb was in good condition, painted in white and therefore visible to a normally careful person, and given the fact that it was possible to reach the stores without walking on it, the curb had played no active role in the fall of the victim.

1/163 These cases prove one thing: when the thing alleged to have caused the damage is inert, it may only be held to have played some active role, triggering liability based on art 1384, when it is not properly maintained, signalled, painted, or positioned, thus rendering it abnormal. In other words, the party having custody of such a thing does not incur liability unless having done something wrong in connection with it. Though matters are not described this way in French cases and in the literature, the victim must prove wrongfulness in order to be compensated when harm is the consequence of a fall on some inert thing.

II. The three levels of wrongfulness under French law

1/164 A flexible approach to the notion of wrongfulness cannot but be approved when it comes to developing comparative perspectives[387]. *Koziol* proposes a three-level approach when it comes to looking at the incorrectness of conduct.

1/165 The first level is a *theory of wrongfulness of the result. Koziol* describes it as aiming at protecting some higher interests, »such as life, health, liberty and property«[388], and preventing damage to them. From a French perspective, this echoes the victim-oriented *théorie de la garantie,* focusing on the idea that the victim's interest must be protected and compensation is due, the legal-ethical element residing in the infringement of a higher interest[389]. In French law, this approach is conducive of no-fault or strict liability, which seems to be favoured when it comes to

384 Among the cases cited by *Viney/Jourdain,* Les conditions de la responsabilité[3] no 674, see Cass Civ 2, 22 November 1984, JCP 1985, II, 20477, note *N. Dejean de La Bâtie*.

385 See the many cases cited by *Viney/Jourdain,* Les conditions de la responsabilité[3] no 674 note 225.

386 Cass Civ 2, 29 March 2012, JCP 2012, no 701, note *A. Dumery,* commented by *Moréteau* in: Oliphant/Steininger, European Tort Law 2012, 229, nos 56–59.

387 Basic Questions I, no 6/6.

388 Basic Questions I, no 6/7.

389 *Starck,* Essai d'une théorie générale de la responsabilité civile considérée en sa double fonction de garantie et de peine privée (1947); *Viney,* Introduction à la responsabilité[3] no 54.

protecting bodily integrity and property[390]. However, it is excluded when it comes to the compensation of non-pecuniary damage, where it is necessary to come back to more traditional tort doctrines. In such cases, the French may agree that »this wrongfulness of the result (...) is not in itself suitable to serve as a decisive *liability criterion under the law of tort*«[391], though said wrongfulness may support defensive rights such as acting in self-defence or using preventive injunctions[392]. This should not, however, lead one to believe that strict liability is devoid of a legal-ethical element, as the author seems to suggest[393]. Prioritizing the protection of human life on the highways is not a purely legal choice, it includes a moral judgement. Human beings cannot survive and prosper without using public roads and streets, as pedestrians, users of public transport or motorists. Freedom of movement is recognised as a human or fundamental right. With the advent of motorised transportation, our contemporaries expose themselves to risks higher than those existing at the time of horse-drawn carts. As a response, jurisdictions like France, Israel or New Zealand adopted strict liability and socialised compensation schemes. Potential perpetrators operating in such a strict liability environment know the rules of the game and have to act with the utmost care to avoid exposing others to bodily injury and property damage, and exposing themselves to liability by the simple fact of collision with another vehicle or a pedestrian. All motorists are potential perpetrators, protecting others and protected by others. Non-motorists are legally protected unless their inexcusable fault can be regarded as the exclusive cause of the accident[394]. There is a strong solidarity element there: you share the road, you share the risk.

Are pedestrians more careful in an environment where the chances of getting **1/166**
compensation are contingent on fault-based liability claims? Statistics by insurance companies may suffice to prove that the shorter the life expectancy, the more careful people are. Younger people tend to be careless whatever the legal environment. They expose themselves as much as they expose others. At the other end of the spectrum, though statistically known to be more careful, elderly people are frail and have slower reactions, making them more exposed to accidents. Therefore, French law affords additional protection to the young and the elderly, as well

390 Strict liability in cases of automobile accidents and damage caused by defective products is indeed limited to the compensation of harm to life, health and property.
391 Basic Questions I, no 6/8.
392 Basic Questions I, no 6/9.
393 Basic Questions I, no 6/8.
394 Art 3, Law no 85-677 of 5 July 1985.

as to the disabled[395]. French doctrine calls them super-protected victims (victimes superprivilégiées)[396].

1/167 The second level of incorrectness is described as »carelessness in the given situation« and is measured according to an objective standard[397]. This *theory of wrongfulness of the conduct* matches the breach of a duty of care doctrine observed in common law jurisdictions, particularly in English law. Though the French Civil Code does not expressly require the existence of a duty of care, it is commonly admitted that fault means either the breach of a statutory duty or the infringement of more general duties, such as the duty to behave, in all circumstances, in a careful and diligent way (devoir général de prudence et de diligence)[398], as discussed above. The violation of a pre-existing duty, or the infringement of an existing right, characterises the illicit element (wrongfulness), expressly requested in the Italian Civil Code[399] and implicitly required in the French Civil Code. A majority of authors accept that wrongfulness (l'illicite) is required[400], making French law wrongfulness-of-the-conduct driven whenever liability is fault-based. *L'illicite* is the objective element, and *l'imputabilité* refers to culpa and constitutes the subjective element[401].

1/168 The third level of incorrectness of the conduct looks at »whether the objectively careless act can be counted against the specific perpetrator on the basis of subjective abilities and circumstances«[402]. It refers to the subjective dimension of fault. It cannot be denied that this is a »weightier criterion for liability«, and it is certainly the case in many cases of fault-based liability that end up being resolved in criminal courts, the victim bringing the claim in damages in a forum basing judgment on very subjective circumstances. In all other cases, as explained earlier in this chapter, French courts tend to presume that the subjective element exists from the moment they are convinced that the actor's conduct was wrongful.

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395 Art 3: »Victims, apart from drivers of terrestrial motor vehicles, shall be compensated for the damage resulting from personal injuries suffered by them, and their own fault may not be pleaded against them, except where their inexcusable fault was the sole cause of the accident. Where the victims referred to in the preceding subparagraph are under the age of sixteen or over the age of seventy or where, irrespective of their age, they are holders of a certificate attesting a degree of permanent incapacity or invalidity of at least 80 %, they shall in all cases be compensated for the damage resulting from the personal injuries they have suffered. Nevertheless, in the cases mentioned in the two preceding subparagraphs, the victim shall not be compensated by the person who caused the accident for the damage resulting from his personal injuries, where he intentionally brought about the damage suffered.«

396 *F. Chabas,* Le droit des accidents de la circulation après la réforme du 5 juillet 19852 (1988) no 179.

397 Basic Questions I, no 6/10.

398 *Galand-Carval* in: Widmer, Unification of Tort Law: Fault 89, no 10.

399 Art 2043 Civil Code.

400 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 443.

401 Ibidem no 442.

402 Basic Questions I, no 6/12.

III. Protection against insignificant infringements

Typically, people do not sue in the case of minimal damage, the cost and hassle of litigation exceeding the anticipated compensation. However, some people would sue regardless of the magnitude of the damage, making it clear that they are vindicating their right rather than looking for monetary compensation. This typically happens where the damage is caused by criminal action, the prosecution having no right to drop the charge when there is a civil law suit by the victim (plainte avec constitution de partie civile). Many victims are looking for opportunities to make impact statements and obtain public recognition that a wrong was suffered[403]. Where there is an infringement of a personality right, such as honour, privacy, or image, many a victim would be content with nominal damages, and the publication of a statement in the medium that infringed the right was published in[404]. Reparation is not exclusively a financial matter, especially when it comes to protecting extra-patrimonial rights. **1/169**

There is no *de minimis rule* in the French Civil Code. Justice must be done also for small claims. De minimis standards may exist in contractual practice, where they are customary. Very often they are contracted upon, like the 5 %-surface allowance in sales of immovables, stipulated by professional sellers of apartments or houses to be built (vente en l'état futur d'achèvement), or the 3 to 5 %-quantity allowance in sales of raw materials and commodities. In tort law, the rule remains full compensation (réparation intégrale), which may lead to the award of nominal damages when a fundamental right is infringed (the *euro symbolique,* or previously the *franc symbolique).* **1/170**

The refusal of compensation or the denial of an injunction in the case of a minor nuisance (trouble de voisinage) is regarded by some as the application of a de minimis rule[405]. It actually reflects the fact that there is no wrongful nuisance in such a case, because the nuisance complained of is below the normal level of inconvenience that neighbours must tolerate when they live close to one another. The standard of nuisance is abnormality (inconvénients anormaux de voisinage), which is however regarded as a question of fact by the French Court of Cassation, though this is obviously a legal question. As explained earlier[406], the highest Court in France tends to enlarge the scope of what it considers an issue of fact whenever it wants to reduce the scope of its review[407]. *Viney* observes that that the Court of **1/171**

403 A wealth of literature has developed in the United States around the idea of victim impact statements. See *C. Guastello,* Victim Impact Statements: Institutionalized Revenge, 37 Arizona State Law Journal 1321 (2005).

404 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1620.

405 Basic Questions I, no 6/19; *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 7183.

406 Above no 1/19.

407 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 7184.

Cassation did not abdicate all review power on the matter, as it verifies that lower judges characterise the abnormality, sometimes interfering with the characterisation[408]. Authors in the field write that it must be assessed *in concreto,* taking into account the nature and standing of the location, the population density, the purely residential or mixed environment, etc[409]. Whilst the threshold of what may be tolerated (le seuil de tolérance) must be based on careful factual analysis, this is ultimately a question of law, to be determined in accordance with a standard[410]. The moment one applies a standard, one adopts an objective perspective[411]. Does this mean that subjective perceptions are to be eliminated? Some victims are more sensitive to noise than others. As a rule, courts refuse to take into account the victim's predisposition in order to reduce compensation[412]. This does not mean that they may not take such predisposition into account to increase the quantum of damages when convinced that the victim was more sensitive[413]. Take the case of a malicious perpetrator who, knowing that a neighbour is particularly sensitive to noise or suffers an allergy, intentionally aggravates the victim with noise or planting highly allergenic plants under the window. Compensation would probably be granted, though the nuisance may be significantly below the level of abnormality. Such a judgment, however, should rather be based on the general clause of art 1382 or on abuse of right than on the doctrine of »trouble de voisinage«.

1/172 Compensation of trivial damage is often denied by insurance companies. Standard insurance policies impose significant deductibles (franchise) to limit the number of claims. A waiver of a deductible is an expensive item, sometimes offered to favoured customers. The insured typically prefers to pay a reduced premium. The deductible can be compared to the »co-pay« system imposed on patients who may only get refunded for a limited proportion of their medical expenses (typically 70 %), though many people purchase complementary insurance to benefit from 100 % coverage[414].

1/173 The existence of an insurance deductible, which makes sense from an economic perspective, does not prevent the victim from suing for recovery of the uncovered amount. In this respect, the € 500 threshold imposed by the European Directive of 1985 for the compensation of damage caused by defective products is questionable. The French did not regard the imposition of a threshold as a condi-

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408 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 954.
409 Ibidem.
410 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 953, describe this liability as »objective«, as it revolves on the abnormality of the nuisance.
411 *Moréteau,* Le standard et la diversité, in: Bussani/Graziadei (eds), Law and Human Diversity 71.
412 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1787.
413 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 7186 f.
414 Long-term patients can claim the benefit of 100 % coverage (longue maladie).

tion of harmonisation, and preferred to be more protective of victims[415]. Following an action brought by the Commission, the French Republic was regrettably forced by the European Court of Justice to impose the € 500 threshold[416].

IV. Protection of pure economic interests

1/174 According to *Koziol,* »[w]e talk of damage to pure economic interests when there are disadvantageous changes to assets sustained without any violation of so-called absolutely protected rights – ie in particular personality rights, *in rem* rights and intellectual property rights[417]«. Such rights are to receive limited protection, »because they do not concern the infringement of already specified and legally recognised interests[418]«, *Koziol* also adding that »the interests are not discernible to third parties and if there was farther reaching protection there would be a danger of boundless duties to compensate[419].«

1/175 French law does not know such restrictions and does not even have a concept of pure economic loss[420]. The Civil Code does not define reparable damage, and any identifiable damage may be repaired under French law, provided it is certain and direct. It seems that the »horror pleni« of the *incalculable number* of victims[421] should be mitigated by a proper application of causation requirements[422]. French law maintains the principle of full compensation (réparation intégrale), while avoiding unwarranted consequences by a careful use of other elements of liability. Suppose that at rush hour a car running out of gas is immobilised in a heavily frequented urban tunnel, causing a monstrous traffic jam. Thousands of people face delay: some may miss profitable business opportunities, may arrive late for an exam, and may miss flights or a last chance of validating a lottery ticket. Supposing one of them sued the negligent driver who forgot to tank-up before driving, courts would conclude that the damage is not the direct consequence of the defendant's negligence, or if admitting causation, that it simply caused a loss of a chance thus minimising compensation[423], or may also decide that driving in a busy tunnel implies the assumption of a risk.

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415 Art 1386-2 Civil Code as originally drafted under Law no 98-389 of 19 May 1998.

416 Cour de Justice des Communautés Européennes (CJCE) 25 April 2002, C-183/00, D 2002, 1670, observations *C. Rondey. Viney/Jourdain,* Les conditions de la responsabilité[3] no 776.

417 Basic Questions I, no 6/47.

418 Ibidem.

419 Ibidem.

420 *C. Lapoyade Deschamps,* La réparation du préjudice économique pur en droit français, Revue internationale de droit comparé (RIDC) 1998, 367.

421 Basic Questions I, no 6/49.

422 *Lapoyade Deschamps,* RIDC 1998, 368.

423 Ibidem 371.

1/176 Likewise, claims by indirect victims complaining about loss of support due to the death of a loved one (victime par ricochet) are limited to those who suffer personally and directly, which includes close relatives and the deceased's closest friends but excludes business partners or creditors[424]. Generally speaking, causation appears to be the main stopper to unreasonable or excessive claims[425].

1/177 All this shows that, much as in common law or Germanic jurisdictions, significant compensation of pure economic loss is mainly to be found in the contractual sphere, where it is contained by the legislative limits to be found in the Civil Code[426]. The French experience gives no signal that the principle of full compensation should be limited in order not to include pure economic loss except in contract cases, where in the absence of bad faith on the part of the obligor, compensation is limited to foreseeable damage[427]. Causation and certainty of damage do the trick.

1/178 Interestingly, the floodgate syndrome is absent from French literature. Such a syndrome develops in those jurisdictions where access to compensation is narrowly channelled and limited[428]. In the common law, access to damages was historically limited by causes of actions (the writs), later to be replaced by binding precedents. No writ, no action. No precedent, no remedy. Opening new remedies in new situations is of course possible but generates conservative hostility and the fear of unpredictable consequences. Since there is no general or conceptual boundary to the development of liability, anxiety can take its course, as the development of tort law is notionally fully open and expansible. In Germanic countries, there is a tradition of defining the protected interests in separate boxes, yet with a possibility of opening protection to some unlisted interest[429]. The moment a new interest pops up, the floodgate syndrome is activated. Under French law, the general clause of art 1382 gives the broadest framework possible, rather than digging narrow canals or drawing little boxes. Canals may need to be controlled by floodgates. A system as large as a sea or a vast lake is not generative of floodgate syndromes. This is why the French can live without »the 10 commandments of liability for economic loss«[430] though French judges and scholars would without doubt agree that they make sense. An analysis of French cases in the light of such valuable guidelines may prove that, in their judgments, French courts do not deviate from the common core of Western legal systems[431].

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424 Ibidem 375.
425 Ibidem 379 f.
426 Ibidem 373 f.
427 Art 1150 Civil Code.
428 *J. Gordley,* The Rule against Recovery in Negligence for Pure Economic Loss: An Historical Accident? in: M. Bussani/V.V. Palmer (eds), Pure Economic Loss in Europe (2003) 25, concludes at 55, that the rule »was adopted in Germany and in England on the strength of an argument that would not be persuasive today«.
429 §§ 823 and 826 BGB.
430 Basic Questions I, nos 6/62–72.
431 *Bussani/Palmer* (eds), Pure Economic Loss in Europe (2003).

V. Liability for others

Though the French Civil Code makes no provision that »[a]s a rule no one is responsible for unlawful acts of third parties in which he had no part«[432], it is clear under French law that liability for others is limited to those cases for which the law makes provision. **1/179**

Article 1384 of the French Civil Code reads: »A person is liable not only for the damage he causes by his own act, but also for that which is caused by the acts of persons for whom he is responsible« (para 1), also providing: »[f]athers and mothers, in so far as they exercise parental authority, are solidarily liable for the damage caused by their minor children who live with them« (para 4), »[m]asters and employers, for the damage caused by their servants and employees in the functions for which they have been employed« (para 5), »[t]eachers and craftsmen, for the damage caused by their pupils and apprentices during the time when they are under their supervision« (para 6), and para 7 exonerating parents or craftsmen when they »prove that they could not prevent the act that gives rise to that liability«[433] and para 8 requiring negligence to be proved in law suits against teachers. In a landmark case of 1991[434], the Court of Cassation inferred from art 1384 para 1 a general principle of liability for others, making a rehabilitation centre liable for the damage caused by a handicapped patient under its care, who had voluntarily started a fire that destroyed a forest. **1/180**

Regarding liability for auxiliaries, the scope of art 1384 para 5 is very general[435]. It cannot be disregarded in cases where liability may stem from a contractual obligation in application of the *non-cumul* rule, since courts also cite the article when dealing with contractual matters[436]: French law recognises a general principle of contractual liability for the acts of auxiliaries, which encompasses the rule in art 1384 para 5[437]. **1/181**

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432 § 1313 ABGB.

433 French jurisprudence makes parents strictly liable (no exoneration possible), for any damage directly caused by the minor child living with them, regardless of whether the child was at fault or not: Cass Plén, 13 December 2002, D 2003, 231, note *P. Jourdain.* This rule has been criticized: see *Viney/Jourdain,* Les conditions de la responsabilité[3] no 869 f; *Francoz-Terminal/Lafay/Moréteau/Pellerin-Rugliano* in: Martín-Casals (ed), Children in Tort Law I: Children as Tortfeasors 167.

434 *Blieck* case, Cass Plén, 29 March 1991, JCP 1991, II, 21673, note *J. Ghestin,* D 1991, 324, note *C. Larroumet,* RTD Civ 1991, 541, observations *P. Jourdain.* See, for a full discussion, *Viney/Jourdain,* Les conditions de la responsabilité[3] nos 789-8 to 789-30.

435 Art 1385 para 5: »Masters and employers, [are liable] for the damage caused by their servants and employees in the functions for which they have been employed.«

436 *Viney/Jourdain,* Les conditions de la responsabilité[3] nos 791-2 and 813.

437 *Viney/Jourdain,* Les conditions de la responsabilité[3] nos 791-2 and 822.

1/182 That the liability of the principal must be based on the *objective misconduct* of the auxiliary[438] is beyond doubt under French law: it is enough to prove that the auxiliary has, within the scope of his functions, acted in such a way that he would incur liability, had he acted on his own account[439]. The auxiliary pursues the principal's interest and the auxiliary acts within the principal's sphere of responsibility[440]. France no longer bases the principal's liability on a presumption of the latter's fault in the choice or the supervision of the auxiliary[441]. French scholars have named the ideas of risk *(Savatier),* guarantee of the victim's rights *(Starck, Larroumet),* legal substitution of the principal *(Mazeaud),* equity and social interest *(Rodière),* or authority exerted over the auxiliary (Julien), as a possible foundation[442]. *Viney* adds the relevance of the principal's solvency and insists that beyond the principal portrayed as an individual, the law targets the enterprise, perceived as an economic unit[443], an idea that comes close to the concept of enterprise liability, embraced by the European Group on Tort Law[444].

1/183 When the damage is caused by the auxiliary's fault, there is no need to sue the auxiliary alongside the principal, though the victim may tend to do so by way of civil action, when the auxiliary is prosecuted[445]. In the past, the principal's liability did not shield the auxiliary from legal action by the victim[446]. In the *Rochas* case[447], the auxiliary was held to be immune in a recourse action by the principal when having acted within the scope of his mission, limiting the principal's recourse to cases of a personal fault by the auxiliary (»faute personnelle«, outside the scope of his duties). Things were pushed further with the *Costedoat* case[448]. Farmers had contracted with a company to spread herbicides by helicopter. The pilot, an employee of the company, did so on a windy day, causing the products to damage neighbouring plantations. Owners who suffered damage sued both the principal and the pilot, and all were found liable by the lower courts: the pilot had been negligent, since he should have refrained from spraying on a windy day. The Plenary Assembly of the Court of Cassation firmly disagreed, ruling that when acting within the scope of his mission, the auxiliary is not liable to third parties. *Viney*

438 Basic Questions I, no 6/96.
439 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 807.
440 Basic Questions I, no 6/97.
441 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 791-1.
442 Ibidem, citing all references.
443 Ibidem.
444 Art 4:202(1) PETL. Basic Questions I, no 6/192.
445 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 811.
446 Ibidem. Principal and auxiliary are then liable in solido: Cass Civ 2, 28 October 1987, Bull Civ II, no 214.
447 Cass Com, 12 October 1993, D 1994, 124, note *G. Viney,* JCP 1995, II, 22493, note *F. Chabas,* RTD Civ 1994, 111, observations *P. Jourdain*.
448 Cass Plén, 25 February 2000, JCP 2000, II, 10295, note *M. Billiau,* D 2000, 673, note *P. Brun,* RTD Civ 2000, 582, observations *P. Jourdain*.

acknowledges that it would have been possible to shield the auxiliary against the principal without sacrificing the victim's interest: the immunity towards victims was too extensive. The victim should have a cause of action against the auxiliary when the latter is at fault, even when acting within the scope of his functions. The scope of the *Costedoat* ruling was later reduced, at least in cases where the auxiliary's fault is also a criminal offense, the Criminal Chamber of the Court of Cassation allowing the victim to claim compensation against the auxiliary when the fault, though not intentional, is serious enough[449].

1/184 The draft reforms[450] tend to restrict the overall use of the principle »respondeat superior«, and to refine the scope of liability for others, somehow meeting the concern that entrusting someone with a task does not necessarily lead to an increase in risk, but may rather reduce risk when a more competent person is entrusted with the task[451]. The *Terré* draft[452] defines the scope of liability for auxiliaries using modern language[453]. It introduces a dualistic approach, distinguishing whether or not principal and auxiliary are bound by a contract of employment, with them being renamed employer and employee when such a contract exists.

1/185 Where a contract of employment exists, the employer is liable except if an abuse of function (abus de fonction) is proved on the part of the employee, namely when acting without authorisation for a purpose unconnected with the employment[454]. Under the same provision, the employee is liable for the consequences of his intentional fault, which does not mean that the employer will always be exonerated in such a case. The draft reforms propose the following solutions regarding immunity against victims. Both the *Terré* draft[455] and the *Catala* draft[456] exclude the liability of the employee acting within the limits of his employment when the employee has committed no intentional fault. The *Catala* draft rightly adds an exception for cases where the victim cannot recover from the employer or from insurance[457], a point left open in the Principles of European Tort Law[458].

1/186 In the absence of a contract of employment, the liability of the principal is based on a simple presumption of negligence, the auxiliary being liable for his

449 Cass Crim, 28 March 2006, JCP 2006, II, 10188, note *J. Mouly,* RTD Civ 2007, 135, observations *P. Jourdain.* See also *Moréteau,* in: Koziol/Steininger (eds), European Tort Law 2006, 196, nos 42–47, discussing CA Lyon, 19 January 2006, D 2006, 1516, note *A. Paulin*.

450 *Moréteau* in: Magnus-FS 77.

451 Basic Questions I, no 6/119.

452 Art 17.

453 The antiquated »commettant« and »préposé« are replaced by »employeur« and »salarié« in art 17, a change not made in the *Catala* draft (art 1359).

454 Art 17 *Terré* draft.

455 Art 17 para 3.

456 Art 1359.1.

457 A point also made in Basic Questions I, no 6/100.

458 Art 6:102 PETL. The employee may however plead the reduction clause in such a case (art 10:401 PETL).

own fault[459]. This meets at least in part the concern that the application of the »respondeat superior« principle may not always be justified in such a case[460].

1/187 Likewise, the *Terré* draft provides an interesting structural change that was also discussed by the European Group on Tort Law, though not implemented in the PETL. Liability for others is not dealt with as a head of liability like fault or liability for the fact of things (fait générateur); it deals with the imputation of liability for compensation, shifting the onus to others. The draft locks liability for others to cases provided for by the law and to cases where there is a delict[461]. This is a big change regarding the liability of parents for the acts of their children, which had been stretched in scope beyond situations where a child was the author of a delict, with infants made liable for *objective fault* etc. One wonders whether the draft does not go too far when limiting the liability of parents to the »act of the minor«, which seems to exclude liability for the act of things, animals, or buildings, which may be too restrictive[462], a restriction not to be found in the *Catala* draft which otherwise makes similar provisions[463]. Regarding liability for auxiliaries, the shift in perspective limits the risk of imposing liability on the principal in situations where the conduct of the auxiliary is not wrongful[464].

1/188 The *Catala* draft makes special provisions allowing victims to sue entities regulating or organising the activities of independent workers, or entities controlling the activities of others, such as franchisors or parent companies[465]. As a rule, under French law, there is no room for applying liability for others in the case of a service contract, as entrepreneurs act independently, in the absence of the supervision of their activities by the other party (absence de rapport de préposition)[466]. The same applies to mandates: as a rule, art 1384 para 5 does not apply to the relationship of principal and mandatary[467]. Exceptions are made, however, in special circumstances where the mandatary acts under the supervision of the principal[468], which is of course the case where the mandatary is also an employee of the principal: one may for instance be concurrently an employee and a mandatary of a legal entity[469]. As a rule, though no particular text may be cited to that effect, legal en-

459 Art 18 *Terré* draft.
460 Basic Questions I, no 6/120.
461 Art 13 *Terré* draft, matching the § 1313 ABGB approach. In contrast, like the PETL, the *Catala* draft treats liability for others like a separate head of liability (Act of a third party, arts 1355–1360).
462 Art 14 *Terré* draft.
463 Art 1356.
464 Basic Questions I, no 6/118.
465 Art 1360.
466 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 795-2.
467 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 795-1.
468 Ibidem.
469 Cass Civ 1, 27 May 1986, Bull Civ I, no 134.

tities are liable for all their constitutionally appointed organs[470]. However, the effects are practically the same as for liability of the principal for auxiliaries, which explains why French law does not pay much attention to distinguishing organs and auxiliaries[471]. It is clear, however, that any misconduct of an organ will be attributable to the legal entity[472], which does not exclude personal liability of the organ[473].

470 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 850.
471 Ibidem.
472 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 854.
473 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 855.

Part 7 Limitations of liability

1/189 This chapter discusses a problem of »excessive liability «[474]. The application of the Germanic equivalence theory (Äquivalenztheorie) makes the damaging party answerable not only for the most direct damage but also for the consequential damage caused to the victim, which may be inequitable or unreasonable[475]. French law has received the equivalency theory (équivalence des conditions) but mitigates its effects by combining it with the theory of adequacy (causalité adéquate), also received from Germanic doctrine, the two being recombined in pragmatic ways by French courts[476]. French doctrine did not feel the need to conceptualise a distinction between *natural* and *legal* causation, though authors are well aware that equivalence is more on the factual side and adequacy on the legal side[477].

1/190 The French view the chain of causation as a continuum[478]. As a rule, the addition of new acts will cause liability to be split, unless such new acts interrupt the causal chain. When the »novus actus« is less serious than the original fault, liability will be split[479]. When the subsequent act of the victim or of a third party is at least as serious as the act of the original perpetrator[480], the causal link is interrupted. This implies a value judgement. An example of the interruption of the causal link by the victim is where the victim of an incident caused by negligence runs at full speed to catch the tortfeasor and dies of a heart attack: the author of the accident is not liable for the death of the victim[481]. A recent case provides an example of interruption by a third party[482]. During a celebration that took place at a private home, the hostess had lit candles downstairs. She later went to bed without giving advice regarding the burning candles, thereby acting negligently. One of the guests subsequently brought the burning candles upstairs where the party went on all night, one of the candles causing a deadly fire in the early morning. In the opinion of the lower court, the original negligence of the hostess was held to

474 Basic Questions I, no 7/1.
475 Basic Questions I, no 7/1 f.
476 See discussion in no 1/137 above.
477 See above no 1/113.
478 *R. Pothier,* Traité des obligations (1761) no 166, talked about »la suite nécessaire«. See *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1776 f.
479 Ibidem.
480 *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1777.
481 *le Tourneau,* ibidem no 1778, citing Cass Crim, 2 December 1965, Gaz Pal 1966, 1, 132, and several other examples.
482 Cass Civ 2, 28 April 2011, Bull Civ II, no 95, RTD Civ 2011, 538, observations *P. Jourdain.* See also *le Tourneau,* Droit de la responsabilité civile et des contrats[9] no 1778.

have contributed to the final disaster, but the Court of Cassation considered that the fault of the third party in bringing the candles upstairs without making sure they would be extinguished in due course interrupted the causal chain. The original fault was no longer the direct cause, and we must conclude, in full agreement with *Koziol*[483], that the subsequent fault constituted adequate cause.

1/191 That the theory of adequacy, originally understood as a theory of causation, might better be described as a theory of liability based on value judgement[484], cannot be doubted. This can be demonstrated positively by considering cases where, often based on considerations of proof, a given fault or act is regarded as the adequate cause, and also negatively, in instances where liability is said to exist though no damage has technically been caused, beyond the mere infringement of a highly protected interest such as a personality right. Based on a value judgement, because such infringement cannot but be sanctioned, nominal damages must be awarded (often in addition to preventive measures) though no harm actually occurred. The fact that the perpetrator acted intentionally can also play a strong role[485].

1/192 The weakness of adequacy as traditionally understood by Germanic scholars, leading to an *all-or-nothing* approach[486], has not permeated French law, which traditionally admits gradations, though not always based on solid logical premises. The flexibility of the French approach of causation has been described in an earlier chapter, featuring a great willingness to adopt proportional liability, using among other things the theory of the loss of a chance, which offers a convenient fiction[487]. Adequacy can indeed be used in a much better way: it is open to gradations, depending on the foundations of the responsibility[488], so as to produce a more logical and predictable answer. This may work perfectly in a logically organised system. However, this is not the case in respect of contemporary French law, which combines fault based, no-fault based, and strict liabilities in somewhat haphazard ways. The good news is that under the careful stewardship of the Court of Cassation, French courts usually offer reasonable, flexible solutions. French jurisprudence limits liability when serious alternate or concurrent causes contribute to the damage, and imposes rebuttable presumptions of causation, especially when highly protected interests, such as human life, are at stake[489].

1/193 The special problem of lawful alternative conduct deserves special attention: »the issue is whether a perpetrator who has acted wrongfully is liable for the dam-

483 Basic Questions I, no 7/6.
484 *Idem* at no 7/7.
485 Basic Questions I, no 7/11.
486 Basic Questions I, no 7/12.
487 Above no 1/131 ff.
488 Basic Questions I, no 7/12.
489 Above nos 1/125 and 128.

age caused even if *he would have caused the same harm otherwise by lawful conduct*[490].« *Koziol* takes the example of a driver overtaking a cyclist leaving too little space on the side and crashing into him, when the damage would have occurred even had he allowed enough space, as the cyclist was drunk and did not keep to his side[491]. Under French law, the special law makes the motorist strictly liable, even in the case of force majeure (such as for instance a violent and unpredictable wind gust) or the victim's fault, except in those rare cases where the victim's fault is both inexcusable and the sole cause of the accident[492]. Before the law of 1985 came into force, liability would have been accorded to the motorist based on the custody of the thing causing the damage[493], but the victim's fault would have been taken into account either to exonerate the motorist if characterised as force majeure (ie the victim's fault was unforeseeable and the accident could not have been avoided; the same would apply in the case of the violent wind gust), or to reduce liability if foreseeable and avoidable[494]. The solution would have been identical in much earlier days, when liability was fault-based[495].

1/194 Another example is that of a doctor operating on a patient without informing him of the risks, yet without committing medical malpractice. The doctor's defence that the patient would have consented to surgery even if informed of all risks does not stand under French law. The Court of Cassation reversed a recent judgment that rejected medical liability[496]: the Court should at the very least have considered the existence of non-pecuniary damage, generated by the unpreparedness of the patient, and the fact that the patient was deprived of the opportunity to make a free choice, ask for a second opinion, etc, in a matter where a strongly protected interest (the right to self-determination over one's own body) was at stake[497]. Commentators of this case insisted that in the opinion of the Court of Cassation, the violation of this behavioural rule had to be sanctioned, given the importance of the protected interests[498]: the explanation that the rule is not so much aimed at preventing damage but instead at deterring certain types of behav-

490 Basic Questions I, no 7/22.
491 *Idem*.
492 Law no 85-677 of 5 July 1985, arts 2 and 3.
493 Art 1384 para 1 Civil Code.
494 Above no 1/158.
495 Arts 1382 and 1383 Civil Code.
496 Cass Civ 1, 3 June 2010, no 09-13591, Bull Civ I, no 128, D 2010, 1522 note *P. Sargos;* RTD Civ 2010, 571, observations *P. Jourdain;* JCP 2010, no 1015, observations *P. Stoffel-Munck; Moréteau* in: Koziol/Steininger (eds), European Tort Law 2010, 175, nos 4–10. To eliminate a risk of infection caused by a urinary catheter, a surgeon performed a prostate adenomectomy, without informing the patient of a risk of erection trouble. The procedure was properly performed but the patient suffered sexual impotence.
497 Basic Questions I, no 7/33.
498 *Jourdain,* RTD Civ 2010, 571.

iour makes sense[499]. Non-pecuniary damages in this case may appear like a form of punishment, satisfying the deterrence function. On the one hand, it would be wrong to shift the onus of further compensation to the doctor, ie all the damaging consequences attributable to the side effects of the surgical procedure, in order to increase deterrence. There is indeed lack of causation, as the harm would have occurred even if the patient had received full information[500]. On the other hand, it would be wrong not to sanction an obviously wrongful situation, and to leave non-pecuniary damage unrepaired. The French solution offers a satisfactory mid-way solution and stands on logical grounds.

Koziol rightly draws a parallel with supervening causation (force majeure cases)[501]. Though full exoneration takes place in cases of Civil Code based liability where force majeure is successfully pleaded, one may wish for some form of punishment of the wrongdoer with a view to deterrence. This may only happen where there is a criminal offense. Germanic views offer another interesting perspective, with the idea that the party who has acted in a manner that poses a specific danger such as the increase of a risk, and acts wrongfully, must bear the entire risk in respect of clarifying the situation[502], which implies a reversal of the burden of proof regarding causation. This would amount to proving, at the wrongdoer's expense, that the increase of risk had no effect in the case at issue. This is a very sensible view, especially in lawsuits against professionals when matters turn out to be quite technical, such as cases of medical malpractice. **1/195**

Koziol also writes that »[w]hen wrongful behaviour is chosen deliberately, the notion of deterrence has greater weight so that full liability of the damaging party is justified even when the violations of the behavioural rules are not so weighty«[503]. Though the intensity or seriousness of fault should not be taken into account when it comes to determining the existence of liability[504], there is little doubt that lower court judges will be keener to identify or presume causation in such circumstances. In addition, the existence of intentional fault or gross negligence (»faute lourde«, considered equivalent to intentional fault[505]) will weigh heavily against the defendant, who may be deprived of the benefit of a legislative cap on liability[506] or of an exemption or limitation clause[507]. **1/196**

499 Basic Questions I, no 7/26.
500 Basic Questions I, no 7/24.
501 Basic Questions I, no 7/29.
502 Basic Questions I, no 7/28, citing *M. Karollus*.
503 Basic Questions I, no 7/34.
504 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 596.
505 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 606.
506 An unusual situation under French law, as caps do not even exist in cases of strict liability. *Viney* cites the example of marine transportation *Viney/Jourdain,* Les conditions de la responsabilité[3] no 604.
507 *Viney/Jourdain,* Les conditions de la responsabilité[3] no 604.

Part 8 The compensation of the damage

I. The myth of full compensation as a basic principle

1/197 French law is strongly attached to full compensation of the damage. Though not formulated in the tort-related Civil Code provisions, full compensation of the damage is presented as a basic principle of French tort law (principe de la réparation intégrale)[508]. *Viney* and *Jourdain* suggest the more accurate wording of equivalency of damage and compensation (équivalence entre dommage et réparation)[509]. French scholars present it as the leading guideline when it comes to assessing damages[510]. The Court of Cassation has repeatedly asserted that civil liability aims at re-establishing, as exactly as possible, the equilibrium broken by the damage, and at repositioning the victim in the situation that would have existed in the absence of the damaging act[511]. Though examples can be found where this turns out to be true, a closer look shows that this so-called principle is at best an aspirational guideline, more often frustrated than accomplished and sometimes frustrating when accomplished.

1/198 As will be shown, and as shocking as this may sound to many a reader, a deeper, invisible driving force of French law may well be the principle articulated by *Koziol,* in one of the most powerful and truthful pages of his book, to the effect that »the stronger the grounds for liability on the side of the damaging party, the more comprehensive the compensation[512]«. The fact that this corresponds to the general opinion of people is not to be neglected: sociological studies have shown that over 70 % of people believe that the amount of compensation should be related to the magnitude of fault[513].

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508 See discussion in no 1/107 ff above. Art 1149 Civil Code, »Damages due to the obligee are, in general, for the loss he suffered and the profit of which he was deprived…« though regulating contractual liability, is often cited in support of the principle.

509 *Viney/Jourdain,* Les effets de la responsabilité[2] no 57.

510 Ibidem at FN 3.

511 *Viney/Jourdain,* Les effets de la responsabilité[2] no 57: »Le propre de la responsabilité est de rétablir, aussi exactement que possible, l'équilibre détruit par le dommage et de replacer la victime dans la situation où elle se serait trouvée si l'acte dommageable n'avait pas eu lieu«, citing several cases including Cass Civ 2, 20 December 1966, D 1967, 169. One may note that this language is highly conducive of restoration in kind, which is not mentioned however, the Court of Cassation keeping its very short reasoning within the ambit of the appeal, which appears to relate to a claim in damages.

512 Basic Questions I, no 8/8.

513 *J.L. Aubert/G. Vermelle* (eds), Le sentiment de responsabilité (1984) 31.

A. The so-called principle of full compensation

1/199 In the search of arguments in favour of full compensation, leading authors cite examples proving that in reality full compensation is not provided, especially in cases of bodily injury. The mere fact that courts routinely resort to a percentage of incapacity is fully arbitrary and does not take into account the victim's personal circumstances. *Viney* and *Jourdain* praise a Parisian court judgment for deciding that in order to compensate bodily injury inflicted upon a severely handicapped victim, recourse to compensation proportional to invalidity was to be abandoned[514]. According to the court, compensation was to be adjusted to the real needs of the victim, in order to ensure the best survival conditions possible, taking into account the victim's personal circumstances. With respect, this is precisely what courts should do in every single case of personal injury if the principle of full compensation, as articulated by the Court of Cassation and doctrine, is to make sense. Why restrict it to the case of a severely handicapped person?

1/200 Another area where full compensation is at best mythical is the compensation of non-pecuniary damage where »it loses all significance« and »generates the worst difficulties«[515]. By its essence, such damage cannot be assessed; how then could it be fully or comprehensively compensated? Comprehensive compensation can at most mean that every head of damage will be taken into account. It cannot mean full compensation. Leading authors recognise that full compensation may be way too severe on the damaging party in cases of slight negligence or no-fault based liability and where there is no insurance coverage[516].

1/201 The only cases where one might get close to full compensation are damage to property, where a replacement is available, and pure economic loss, at least in those cases where it can be assessed precisely. But even there it can prove to be objectionable, as exemplified in a famous case. In 1955, in a New York gallery, an art collector had bought a Van Gogh painting, *Jardin à Auvert,* at a price of French francs (FRF) 150,000. In 1981, the owner applied for an export license as he wanted to move the painting to Geneva. The license was denied, and he presented the painting at a French auction where it sold for FRF 55 million. He sued the French government, complaining that as a consequence of their classifying the painting as a national heritage, he had been deprived of the opportunity of selling it to a foreign purchaser, evaluating the loss at FRF 250 million. The French State was found liable and ordered to pay FRF 145 million in damages[517]. The judgment was

514 TGI Paris, 6 July 1983, D 1984, 10, note *Y. Chartier. Viney/Jourdain,* Les effets de la responsabilité[2] no 58.

515 *Viney/Jourdain,* Les effets de la responsabilité[2] no 58-1.

516 Ibidem, talking about »un enfer de sévérité«.

517 CA Paris, 6 July 1994, D 1995, 254, note *B. Edelmann*.

strongly criticised[518]: it is inequitable to shift a speculative loss onto French taxpayers[519]. The Public Treasury was ultimately defeated, the Court of Cassation noting that the lower court had duly evaluated the damage, comparing the sale price in France with the sale price of comparable items on the international art market at the time when the painting was classified[520].

1/202 This case may have been decided under a wrong doctrine and in the wrong court. It looks more like an unjustified enrichment claim, where the French Republic keeps the painting on its territory considering it a national heritage, thereby creating a possibility for its national museums to pre-empt it, on the occasion of the next sale, at a cost way below its international value (enrichment side), and the previous owner is deprived of a substantial share of the mercantile value as calculated on the global art market (impoverishment side). The case should have been adjudged by an administrative court, the State being sued for a loss caused in the exercise of government power. Looking at it as a tort causes discomfort, knowing that the plaintiff might have recovered 1 or 2 % of the awarded amount if suing for the loss of a child or of a spouse. *Viney* and *Jourdain* agree that pure pecuniary interests should not take priority over health care costs and loss of earning capacity; they accept, criticising this judgment, that there may be a hierarchy of protected interests[521]. They refer to the concept of legitimate expectations, and express a preference for *equitable* or *adequate* compensation[522].

B. The many limits to full compensation

1/203 Full compensation is seldom a reality. Money cannot properly compensate for the loss of a dear one or the loss of a limb, leaving the most serious losses under-compensated. Money may compensate for the loss of earnings but does not replace the fulfilment some people may find in their job. Non-pecuniary losses affect human beings in their essence, and cannot be properly evaluated and compensated. Damage to property and economic losses are the only heads of damage that may be assessed with some reasonable certainty.

1/204 In addition, there are other limits to full compensation that come into play with all kinds of harm, including damage to property and economic loss. Legislative caps to liability may be mentioned, though they primarily exist in the field of contractual obligations. One should not neglect the fact, however, that under the

518 *A. Bernard,* Estimer l'inestimable, RTD Civ 1995, 271; *G. de Geouffre de la Pradelle/S. Vaisse,* Estimer la doctrine: l'art… et la manière, RTD Civ 1996, 313.
519 *Viney/Jourdain,* Les effets de la responsabilité[2] no 58-1.
520 Cass Civ 1, 20 February 1996, Bull Civ I, no 97.
521 Ibidem.
522 Ibidem.

special regime of liability for road accidents[523], higher protection is given to the person than to property. Full strict liability is only applicable to personal injury[524], the victim's fault coming into play regarding damage to property[525]. Contributory responsibility of the victim must indeed be mentioned. It plays an important role not only when liability is based on fault but also in allegedly no-fault liability, such as liability for the act of a thing in one's custody[526]. In cases of liability for others, the employee bears no liability at all where »culpa levis« or »culpa levissima« exist[527].

C. The hidden principle of apportionment

Full compensation is a myth, or at most a convenient, though often misleading, judicial guideline. To infer from this observation that French courts follow a hidden principle that damages must be apportioned based on the seriousness of the damaging activity may be too much of a stretch. *Koziol's* proposal that »the stronger the grounds for liability on the side of the damaging party, the more comprehensive the compensation«[528] will be floated as a hypothesis, to be verified with a more extensive study of French jurisprudence. A number of factors have been revealed in the preceding pages, which should receive more scrutiny from French and comparative law scholars. **1/205**

The first factor is that the propensity to compensate non-pecuniary damage is much higher in the case of an intentional wrong[529]. It is much higher too when the right infringed is a fundamental right, as observed in the context of personality rights[530]. **1/206**

The second factor is that in all situations where the victim's fault is taken into account, judges proceed nolens volens to a comparative-negligence analysis and are likely to determine the case not on purely natural causation factors but based on the respective gravity of the alleged faults. This applies not only to fault-based liability but also to no-fault based liability, such as cases determined on the basis of art 1384 para 1[531]. **1/207**

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523 Law no 85-677 of 5 July 1985.
524 Art 3.
525 Art 5. »Exception is made, however, for damage to supplies and equipment obtained on medical prescription, which are to be treated like personal injury: wheelchairs, prostheses, and other medical devices are thereby treated like extensions of the human body.«
526 See discussion in no 1/158 above.
527 See discussion in no 1/185 above.
528 Basic Questions I, no 8/8.
529 Nos 1/65 and 67 above.
530 No 1/102 above.
531 No 1/158 above.

1/208 The third factor, the interplay of equivalency and adequacy regarding the judgment on causation, injecting an intrinsically legal dimension that interweaves natural causation and wrongfulness, is highly conducive of value-based judgement, leading judges to accept causation when targeting odious conduct or presume causation when a highly protected interest is at stake[532].

1/209 The fourth factor, apportionment of liability, is the rule in cases of uncertainty of causation. The characterisation of the injury as loss of a chance, a head of damage to be fully compensated, is pure fiction, hiding the fact that exception is made to the so-called principle of full compensation. In reality, the victim receives partial compensation[533].

II. Types of compensation

1/210 Unlike the Germanic systems[534], French law has no principle of the primacy of restoration in kind (réparation en nature)[535]. This does not mean that it is ignored. Many cases show that French courts favour restitution in the case of unlawfully detained property, removal or destruction, and restoration of immovables to their original condition[536]. The primacy of restoration in kind is to be welcomed if one accepts that it may be discarded in cases where it appears inappropriate because of cost or inconvenience[537]. As noted above, French judges are encouraged to take preventive measures by way of interim orders whenever it is possible to bring a damaging activity to an end[538].

1/211 As to the assessment of damages, it may be based on a concrete assessment of the loss or based on objective criteria, such as in the case of bodily injury[539]. Judges have the option of awarding a lump sum or periodic payments[540].

532 No 1/115 f above.
533 No 1/131 ff above.
534 Basic Questions I, no 8/11, citing § 1323 ABGB, § 249 BGB.
535 *Viney/Jourdain,* Les effets de la responsabilité[2] no 14.
536 *Viney/Jourdain,* Les effets de la responsabilité[2] no 28-1.
537 Basic Questions I, no 8/13.
538 No 1/43 ff above.
539 No 1/199 above.
540 *Viney/Jourdain,* Les effets de la responsabilité[2] no 73 f.

III. Reduction of the duty to compensate

A few legal systems allow the judge to reduce the amount of compensation in some exceptional cases, particularly when full compensation would create an unbearable burden on the liable party[541]. Such provisions are to be found in Switzerland[542] and the Netherlands[543]. The European Group on Tort Law has devised a reduction clause: »In an exceptional case, if in light of the financial situation of the parties full compensation would be an oppressive burden to the defendant, damages may be reduced. In deciding whether to do so, the basis of liability (Article 1:101), the scope of protection of the interest (Article 2:102) and the magnitude of the damage have to be taken into account in particular.«[544] **1/212**

Whilst such a reduction obviously contradicts the so-called principle of full compensation, it echoes the underlying principle of apportionment identified in the previous paragraph. *Viney* and *Jourdain* recognise that in the event of uninsured damage that occurred having been barely foreseeable, full compensation may be an excessive burden, when the damaging conduct is not blameworthy and the damage very costly[545]. The fact that French legislation is not conducive of judicial discretion in this respect[546] does not prevent courts from making an equitable judgment. Full compensation may be oppressive in a jurisdiction like France where only merchants may be protected by bankruptcy proceedings[547]. **1/213**

Also, as noted in the PETL Commentary, »The reduction clause also makes sense in those systems where the plaintiff's purpose in suing the tortfeasor is to make sure that a criminal prosecution will be taken against him, the victim adding its civil action in damages to the prosecution. In some jurisdictions, the prosecutor is then bound to prosecute and may not decide to drop the charge. The purpose of the civil action may be the official recognition of an infringement rather than full compensation, which may be an oppressive burden to the defendant in some cases.«[548] This clearly applies to France. **1/214**

541 Basic Questions I, no 8/24.
542 Art 44 sec 2 Obligationenrecht (OR).
543 Art 6:109 Burgerlijk Wetboek (BW).
544 Art 10:401 PETL.
545 *Viney/Jourdain,* Les effets de la responsabilité[2] no 58-1.
546 *Viney/Jourdain,* Les effets de la responsabilité[2] no 59, noting that when liability of the mentally disabled was voted into law (law of 3 January 1968), the draft proposal to allow judges to reduce the amount of compensation (pouvoir modérateur) was eliminated.
547 Art 10:401 PETL, comment 6 *(O. Moréteau)*.
548 Ibidem, comment 9.

Part 9 Prescription of compensation claims

1/215 In France, prescription was reformed by a law of 17 June 2008 (loi portant réforme de la prescription en matière civile)[549] rewriting entirely two titles of Book III of the French Civil Code: Title XX (Of Extinctive Prescription) and Title XXI (Of Possession and Acquisitive Prescription). The new law is partly based on the *Catala* draft reform of the law of obligations and prescription. This may be regarded as good news wherever such departure leads to improved convergence with other European systems. To some extent, the new law brings some simplification to this long neglected and complicated area of the law.

1/216 The very nature of extinctive prescription remains controversial, as was the case in the past. Art 2219 gives a definition: »Extinctive prescription is a means of extinction of a right resulting from the inaction of its holder during a certain lapse of time.« Such language is imprecise and confusing, since the definition does not indicate whether it is the substantive right that is extinguished or the procedural right to sue. This is a consequence of French formalism rather than pedagogy[550]. The new law continues to juxtapose extinctive prescription (extinction of a right) with acquisitive prescription, defined in art 2258 as a »means of acquiring property or a right by the effect of possession.« The juxtaposition between »extinction of a right« and »acquisition of a right«, makes for an elegant binary distinction, a symmetrical »jardin à la française«, a format cherished by French jurists. Careful analysis indicates that extinctive prescription is a defence: according to art 2247, the judge may not raise prescription on his own motion. It bars a right to performance or to damages, but does not extinguish the obligation. In addition, no restitution may be ordered in the case of payment of a prescribed debt, such payment transforming what had become a natural obligation into a civil obligation[551]. This is a clear indication that there is no extinction of the substantive right but simply a defence, and that French law »is in line with what is widely recognised internationally«[552].

1/217 Major changes have been made to prescription periods and the way they are calculated. The main purpose of the reform is to favour the convergence of legal

549 Law no 2009-561 of 17 June 2008, commented on by *Moréteau* in: Koziol/Steininger (eds), European Tort Law 2008, 264, nos 1–12, often reproduced verbatim in this chapter; *F.X. Licari,* Le nouveau droit français de la prescription extinctive à la lumière d'expériences étrangères récentes ou en gestation (Louisiane, Allemagne, Israël), RIDC 2009, 739.

550 *A.M. Leroyer,* Législation française, RTD Civ 2008, 563 at 564.

551 Art 1235 Civil Code.

552 *R. Zimmermann,* »Extinctive« Prescription under the Avant-projet, 15 European Review of Private Law 2007, 805 at 812.

systems and bring some needed simplification. Art 2262, which used to state that »All actions, real as well as personal, are prescribed by thirty years«, has been abrogated. The very lengthy thirty-year period is no longer the default rule[553]. According to the new art 2224, »personal actions or those pertaining to movables are barred five years from the day the holder of a right knew or ought to have known the facts permitting to exert it.« The Civil Code presents this rule as the default rule. The thirty-year rule is now limited to real actions pertaining to immovables[554]. The default five-year rule applies to all actions that had special rules in the past, with periods shorter than thirty years.

1/218 One should not dream of an oversimplified world, however. Exceptions exist, some having an impact on tort claims. A thirty-year period applies to damage to the environment, starting from the event generating the damage[555]. A twenty-year period applies to damage caused by torture or acts of barbarism, or sexual violence or the assault of minors[556]. A ten-year period applies to actions in compensation of bodily injury[557].

1/219 All distinctions between tort and contract have been abandoned. The law unifies the prescription of actions based on contractual and extra-contractual liability. The *Catala* draft indeed moves towards a unification of the regimes of contractual and extra-contractual liability. Regarding prescription, the basic distinction now is between bodily injury and other heads of damage.

1/220 Regarding bodily injury, the ten-year prescription period runs from the time of consolidation of the initial or aggravated damage. Consolidation means the stabilisation of bodily injury, or the state of the victim once medical care comes to an end: this is the moment where one moves from sometimes extensive temporary incapacity to usually and hopefully limited permanent incapacity, in the event that the victim is permanently incapacitated at all[558]. The same test applies to cases where the prescription period is extended to twenty years, following torture or acts of barbarism, or sexual violence or the assault of minors[559]. These rules are even more protective than those existing in Germanic countries, since those make reference to the

553 It is the only article constituting section I of chapter II (Of Periods and Starting Points of Extinctive Prescription), entitled »Du délai de droit commun et de son point de départ«.

554 Art 2227 Civil Code.

555 Art L 152-1 Environmental Code.

556 Art 2226 para 2 Civil Code.

557 Art 2226 para 1 Civil Code.

558 The concept of consolidation is borrowed from labour law and welfare law: this is the moment where one moves from daily compensation (allocations journalières) to a permanent pension in the case of labour accidents. See *Y. Lambert-Faivre,* Le droit du dommage corporel[4] (2000).

559 Art 2226 Civil Code.

date on which the right could first have been exercised[560], or require knowledge of an existing claim[561], or knowledge of the damage and identity of the damaging party[562].

1/221 In the case of harm other than bodily injury and environmental damage, the five-year default prescription period applies[563]. The five years run from the time the victim knew or ought to have known the facts giving rise to the claim. The *Catala* draft was more victim-friendly, making the test purely subjective since it requested actual knowledge of the facts[564]. The addition of constructive knowledge is welcome. It brings French law into line with German law[565] and also the Unidroit Principles of International Commercial Contracts[566]. The solution comes close to the Principles of European Contract Law, and the test of reasonable discoverability of the damage[567]. The subjective test is complemented by an objective one. Art 2232 imposes a »long-stop« peremptive period (délai butoir), making it impossible to move the starting point of prescription, or to suspend or interrupt prescription beyond twenty years counting from the moment the right starts to exist. This novelty[568], proposed in the *Catala* draft[569], is justified by the »slippery« point of departure of prescription[570]. It is another element of convergence of French law with German law and other European legal systems. The »long-stop« rule does not apply to cases of bodily injury or to the other cases listed in art 2232.

1/222 Prescription does not run or is suspended in the case of »impossibility to act following an impediment resulting from the law, the convention, or force majeure«[571]. This is new in the Code. French courts used to apply the *contra non valentem rule,* though restrictively, and some fear that its legislative presence may give the judge a broader discretion[572]. Prescription does not run or is suspended against unemancipated minors or persons having reached the age of majority in tutorship[573], as well as between spouses or partners in a registered union[574].

1/223 Prescription is also suspended wherever the parties agree to resort to mediation or conciliation, or failing such agreement from the day of the first mediation

560 Austria, § 1478 ABGB and Basic Questions I, no 9/16.
561 Germany, § 199 BGB and Basic Questions I, no 9/18.
562 Switzerland, Art 60 OR and Basic Questions I, no 9/19.
563 Art 2224 Civil Code.
564 Art 2264 para 2 *Catala* draft.
565 § 199 I No 2 BGB.
566 Art 10.2(1).
567 Art 14:301.
568 Though the technique is used in other areas of French civil law: see arts 215, 921 para 2, and 1386-16 Civil Code.
569 Art 2278 *Catala* draft, proposing a ten-year long stop period.
570 *Leroyer,* RTD Civ 2008, 564, 569.
571 Art 2234 Civil Code.
572 *Leroyer,* RTD Civ 2008, 564, 570.
573 Art 2235 Civil Code.
574 Art 2236 Civil Code.

or conciliation meeting. Prescription runs again from the time one or all parties or the mediator or conciliator declare the mediation or conciliation terminated[575]. The same rule applies whenever the judge orders investigation measures prior to litigation, until the moment the measure is executed[576]. In all these cases, when prescription runs again, it cannot be for a period inferior to six months[577].

Seven articles deal with the causes of interruption of prescription[578]. There is nothing special there but the application of well-known rules that prescription is interrupted by a law suit[579] except where the plaintiff abandons his claim or it is finally dismissed[580]. The admission by the debtor of the right of the other party also interrupts prescription[581]. **1/224**

The new law favours contractual arrangements, and parties are left free to contract on prescription periods, as well as on causes of suspension and interruption[582]. Parties may expressly or tacitly waive the right to invoke prescription once the time has run[583]. According to art 2254, »The prescription period may be abbreviated or prolonged by agreement of the parties. However it may neither be reduced to less than one year nor extended to more than ten years«. **1/225**

575 Art 2238 Civil Code.
576 Art 2239 Civil Code.
577 Arts 2238 para 2 and 2239 para 2 Civil Code.
578 Arts 2240 to 2246 Civil Code.
579 Art 2241 Civil Code.
580 Art 2243 Civil Code.
581 Art 2240 Civil Code.
582 Art 2254 Civil Code.
583 Arts 2250 and 2251 Civil Code.

Norway

Bjarte Askeland

Basic Questions of Tort Law from a Norwegian Perspective

Chapter 2

Basic Questions of Tort Law from a Norwegian Perspective

Bjarte Askeland

Part 1 Introduction

I. Basic ideas

Norwegian tort law rests upon the basic principle of *casum sentit dominus,* although this principle is seldom cited in literature within the field[1]. Most attention focuses on the various bases of liability even though in reality the basic view is that damage lies where it falls. Historically speaking, the reasons for attributing damage to persons other than the victim have mostly been tied to ideas of corrective, restorative and retributive justice. In the pragmatic version of the post-World War doctrine of Norwegian tort law, the justification for such responsibility is a claim for *reparation* of the damage, hence thoughts on »the purpose of reparation« have come to the fore in textbooks and doctoral theses on tort law[2]. This is a Norwegian version of corrective justice, which actually comprises two thoughts: firstly, it is important that the victim's damage is remedied or the injury compensated in full. Secondly, it is fair that the party who caused the damage (in a manner that constitutes a legal basis for liability) should pay compensation. The tendency to highlight these two thoughts has been developed by theorists apparently uninformed about the international discussions on corrective justice. Modern theorists have, **2/1**

1 See on this, *A.M. Frøseth,* Skadelidtes egeneksponering for risiko i erstatningsretten (2013) 46–51.
2 See eg *N. Nygaard,* Skade og ansvar (2007) 19 and *P. Lødrup* (with the assistance of *M. Kjelland),* Lærebok i erstatningsrett (2009) 108 ff.

however, imported theoretical insights from international discussions[3]. In recent years, Scandinavian scholars have turned their attention to the ideas of corrective justice developed by theorists like *Weinrib* and *Coleman,* a debate emerging from and building upon the early works of *Aristotle*[4].

2/2 However, in modern times the idea of distributive justice plays a very important role in the development of tort law systems, especially regarding personal injuries. In personal injury cases, the issue of compensation for damage is seen as a comprehensive complex of rules. Rules of tort law make up the foundation, but to a large degree they overlap with rules of insurance schemes and a lengthy social security Act, which provides for many benefits that cover the losses stemming from the damage sustained. This is a feature of Scandinavian welfarism, hence there are similar compensation schemes in Denmark and Sweden. Distributive justice solutions have broad political support. If one looks closer at the preparatory works for the constitutive reasoning behind this system, it seems clear that the idea that the victim should receive full compensation is very important.

2/3 The system also has mechanisms for preventing over-compensation of the victim. The prevailing view is that the victim should be compensated in full but that in general he or she should *not be more* than fully compensated. A clear provision reads that benefits provided by the public should be deducted from the damages to be paid by the tortfeasor[5]. The solution that the social security benefits reduce the claim against the tortfeasor must be regarded as a profound principle within Norwegian law.

2/4 The principle is paired with the fact that the social security institution (»Rikstrygdeverket«) does not have a recourse claim against the tortfeasor. The right of recourse for the social security institution was abolished in 1970[6], except in the case of intention[7]. The abolition was an attempt to stop a development towards too low personal injury awards that did not actually cover the loss. When social security paid the greater part of the actual economic loss of the victim without having recourse to the tortfeasor, it became possible for the tortfeasor to handle the burden of paying compensation. The system also avoids some transaction

3 See Norwegian discussions in *B. Askeland,* Tapsfordeling og regress ved erstatningsoppgjør (2006) 21–32; *Frøseth,* Skadelidtes egeneksponering for risiko i erstatningsretten 49; *B. Hagland,* Erstatningsbetingende medvirkning (2012) 53–59. See also the Swedish theorist *M. Schultz,* Kausalitet (2007).

4 *Aristotle,* Nichomachean Ethics [translated by Tony Irvin] (1985), among other works; *E. Weinrib,* The Idea of Private Law (1995) and *J.L. Coleman,* Risks and Wrongs (1992).

5 See Skadeserstatninsloven (skl.) § 3–1. The draft of 2011 has a more precise formulation of the principle as developed by the courts, see Draft 2011 § 3–4.

6 Om lov om endringer i lov om folketrygd, 19 June 1970 no 67.

7 Ibid § 3–7 no 1 which reads: »The social security or pension institution may not claim recourse from the responsible party for the expenses incurred or liability because of the damage unless it is caused by intent by the responsible party himself«.

costs connected to recourse claims. A point that may be overlooked is that the system actually collects insurance premiums from every citizen, the potential victims. The economic effect resembles mandatory liability insurance for citizens. One may also question whether it is good that the greater part of the loss is not channelled to the real tortfeasors as a cost of the activities that actually produce the personal injuries. Such a system contradicts the main principles of law and economics, such as the idea that the loss should be borne by those that are able to reduce the risk of injuries.

2/5 The idea of reducing the bill for tortfeasors is also evident in situations where a small commune provides for the nursing and care of a citizen seriously injured in traffic at great cost. The commune will not have a recourse claim against the traffic insurer in such a situation[8]. Thus, the public services in reality cover a great part of the victim's expenses related to the damage, reducing the bill for the tortfeasor and the third party insurer. The principle also applies generally to health services provided by public hospitals – in reality such services cover part of the damage[9], but still do not ground a recourse action from the state against the tortfeasor. In fact, one might say that, via payment to the social security system, citizens establish a sort of liability insurance in favour of the tortfeasor. The costs of the social security payment are financed by payments of certain taxes by employers (»arbeidsgiveravgift«, Folketrygdeloven [ftrl.] § 23–2) and every member of the system calculated as a percentage of their income (»trygdeavgift«, ftrl. § 23–3)[10]. On top of this, the state may pay a contribution to the social security fund (»statstilskott«, ftrl. § 23–10.)

2/6 The system is well embedded in preparatory works, in the statutory provisions and in court practice. A symptomatic formulation of the legal position is that tort law compensation is »a supplement« to the benefits and services provided by the social security system and the national health service. The »principle of supplement« is repeatedly applied in cases regarding the assessment of damages for personal injuries[11]. The reflections in Basic Questions I[12] concerning the interplay between social security law and tortfeasors are thus a little different in respect of Norwegian law because of the lack of a recourse action available to the social security institutions.

2/7 The idea of the public providing for a »net« of economic compensation securing the citizen's basic standard of living is really a prioritized political goal under

8 See the case referred to in Retstidende (Rt.) 2003, 1603.

9 *Nygaard,* Skade og ansvar 92.

10 The employer must pay 14 % (or less depending on the geographical area) of the gross salary, whereas employees for the time being must pay 7.8 % of their salaries. For business income the percentage is 11.

11 See eg Rt. 1993, 1548; Rt. 1996, 958; Rt. 2002, 1436 and Rt. 2009, 425.

12 See no 2/76.

Norwegian law. Many insurance schemes are mandatory and secure the victim fully in the event of accidents. This applies to traffic insurance (full compensation) and the compensation for injuries to patients scheme (full compensation by public funds), and partially for the workmen's compensation scheme (full compensation for loss of annual income lower than 10 G (approx € 107,500)[13]. Traffic insurance is a hybrid of liability and first party insurance, whereas the compensation for patients is a first party insurance paid via the ordinary tax bill. The workmen's compensation insurance is paid by employers and is therefore a type of liability insurance.

2/8 An important element of public policy has been to provide systems that guarantee that the victim receives compensation within a short period after the damage is sustained. This is, for example, one purpose behind the design of the worker's compensation scheme[14]. The same is true for the special compensation scheme for patient injuries[15]. In order to ensure that the costs are allocated to the right collectives of insured persons, there are certain provisions prescribing a channelling of funds from mandatory personal injury insurance schemes to the social security system. Thus, according to the law, the holder of a traffic insurance policy must pay a certain fee to the social security system (see ftrl. § 23–7 first section). The fee covers the costs of the social security system that arise from personal injuries caused by traffic accidents (see ftrl. § 23–7 second section)[16]. Since 2004 the fee has been paid through the annual tax to the state for automobile owners. The state pays a corresponding amount to the social security fund[17]. A similar system has been established for the relationship between the workmen's compensation insurance and the social security system: the insurance companies that provide insurance covering accidents at work must pay a refund to the social security system that is meant to cover the expenses of the social security system stemming from accidents at work (see ftrl. § 23–8)[18]. The effect is that employers have to pay higher premiums in order to finance the duty to refund the amount to the social

13 »G« means »folketrygdens grunnbeløp«. One G is currently NOK 88,370 (approx € 10,750). G is the »basic amount« in the Norwegian National Insurance Scheme. It is fixed by the state once a year in order to adjust National Insurance benefits for inflation.

14 See Yrkesskadeforsikringsloven, 16 June 1989 no 65 with preparatory works; eg Norsk offentlige utredninger (Official Norwegian Reports, NOU) 1988: 6, 76.

15 See Lov om pasientskader, 15 June 2001 no 53 with preparatory works; eg NOU 1992: 6, chapter 2.3.

16 The fee has been modest, something like € 25 per year per motorcar. The size of the fee is decided by the government every year.

17 See *A. Kjønstad* (ed), Folketrygdloven med kommentarer (2007) 964 f.

18 See, about the system, NOU 2004: 3 Arbeidsskadeforsikring 404 f. The refunding from the insurers has traditionally been 120 % of the compensation payments from the insurer to the injured employee. See *Kjønstad,* Folketrygdloven 965 f. One must at this point bear in mind that the social security system covers the greater part of the loss of income, whereas the workmen's compensation scheme only pays a supplementing sum.

security fund. In this way the real cost of the employer's business is channelled to some extent to himself – as the individual who makes a profit from the work of his employees. A difference between the traffic liability scheme and the injury at work scheme is thus that the former assigns the duty to refund the social security fund to the insured automobile owner (through the tax bill) whereas the latter assigns the refund duty to the insurance companies.

2/9 The principle of supplement paired with a relatively high general level of public services generates a certain allocation of loss that is important to grasp: a considerable share of the actual damage and loss stemming from tortious behaviour is in reality distributed among all members of society via the tax bill. The fact that the ordinary citizen puts up with a high level of taxation must be explained by the above-mentioned solidarity and welfarism of the modern version of social democracy.

2/10 These ideas also affect the situation of insurers. A first party insurer must pay compensation according to the insurance contract and does not have a recourse claim against the tortfeasor unless the latter acted with intent or gross negligence[19]. Depending on the insurance contract, the victim may receive compensation from both the first party insurer and the tortfeasor. The Act has a special rule to reduce the award if there is first party insurance involved. The market-dominating insurance companies have, however, ceased to claim such reductions, presumably because they want the buyers of first party insurance to feel that their investment is worthwhile. The legal basis for reducing the award therefore »sleeps« except for cases where the state is the tortfeasor, typically in medical malpractice cases where Norsk Pasientskadeerstatning pays the damages on behalf of the state. A situation where only the state takes the benefit of a rule at the cost of a victim may have some disadvantages. The committee who drew up the new draft on personal injury awards has suggested abolishing the above-mentioned rule of reduction[20].

2/11 The above-described salient features of the Norwegian compensation system are mostly relevant for personal injuries. Other types of damage are not affected in the same way by the special Scandinavian approach and ideas of welfarism. Still, there are also rules for channelling the loss sustained from damage to things. Thus, damage to things caused by simple negligence within the private sphere will be covered by the victim's first party insurance provided that he has a policy. If this is the case, the victim is not allowed – this being prohibited by the law – to claim against the tortfeasor directly. And, accordingly, the first party insurer does not have a recourse claim against the tortfeasor. This follows directly from provisions

19 See skl. § 3–1 third section.
20 See NOU 2011: 16, 56–58.

in the Act on Compensation for Damage[21]. In this way, the damage to things that occurs in the private sphere of citizens is mainly covered by first party insurance. However, whenever damage is caused in the course of professional business, the provisions channel the loss to the liability insurers, also in cases where the damage is caused by simple negligence or in cases of strict liability[22].

II. The Norwegian version of pragmatism within tort law

A. The sources of law and the application

2/12 Tort law in Scandinavia has to a large extent been based on broad principles intended to be applied in all areas of life. At the same time, only parts of the comprehensive set of rules are codified in formal statutory provisions. Crudely explained, general rules on culpa, strict liability, causation and the concept of damage are not codified, but exist only as general principles based on court practice and long respected customs. The rule of employers' liability, liability for animals and children and a set of provisions regarding personal injuries, recourse actions, contribution and reduction are codified. As such, the lawmaker – with open eyes – has left great scope for development of the law to the courts. A court decision from the Supreme Court is binding for the lower courts and will accordingly most often be followed as far as the interpretation of the case reaches. Many important areas in tort law are governed by Supreme Court practice[23].

2/13 As long as tort law traditionally has consisted of rather few clear rules, the weighing up of concrete, individual interests in the light of broad principles has been a salient feature of the Norwegian tort law reasoning. Thus, Norwegian theorists have for a long time recognised that the law of torts must be perceived differently than, for example, property law or contract law. The fact that the very core criteria of liability are formulated broadly speaks for a pragmatic approach to Acts, cases and other positive formulations of legal rules. This is necessary in order to apply the broad principles to the concrete and individual cases. As mentioned, the themes of tort law are kept general so that they can fit every area of life. A good example is the culpa rule, which is designed so that it can provide guidance in all kinds of cases, whether the case concerns highly professional technical skills or

21 This system is codified in skl. §§ 4–2 and 4–3.

22 This follows from skl. § 4–2 no 1 b).

23 See eg the important case law on strict liability for dangerous activities, Rt. 1939, 766; Rt. 1948, 719 and Rt. 1983, 1052.

more simple facts of everyday life, such as a teacher taking sufficient care of pupils while they perform gymnastics[24]. The generality of the norms in itself produces a need for discretion and pragmatic approaches based on the specific, individual facts of the case in question. As aired by Norwegian scholars, tort law is »the law of unexpected events«, hence one cannot always make clear rules beforehand[25]. To a certain extent the endeavours behind tort law reasoning require rational combinations of broad principles, similar cases and special considerations based on the merits of the case. In the Norwegian, rather pragmatic, tradition of legal reasoning and legal method, there are quite good possibilities for such adaptations. Especial mention is deserved for the tradition of allocating weight to the »real considerations« of the case, an approach that resembles the idea of taking regard of the nature of the case (»Die Natur der Sache«).

This methodological approach is paired with the mentioned governmental **2/14**
tradition of not codifying the most important rules. Neither the culpa rule nor the rule of strict liability is codified and therefore they are based on a set of considerations and principles that must be converted into operative arguments in the concrete case at hand. These sets of considerations and principles have emerged from case law. At the same time, the strategy of the lawmaker is, and has been, that the development of existing principles is a task for the courts. Roughly estimated, only half of the material rules are expressed in statutory law. Accordingly, court practice plays a very important role in the development of tort law rules. A great number of decisions of the Supreme Court delimit liability and the assessment of damages. These cases provide the benchmarks for legal reasoning and are highly respected by lower courts and great attention is always paid when new variations of legal problems reach the Supreme Court. These factors generate an approach to legal reasoning within tort law that has much in common with the ideas of a flexible system, a point which is occasionally made by theorists[26].

B. A comprehensive methodological approach

The overall picture is complex, but still possible to comprehend as a coherent sys- **2/15**
tem. One must bear in mind that the Norwegian private law enactment, as mentioned above, has for a long time followed an ideology (or policy) of covering only parts of the law. At the same time, the courts are well aware of this and therefore

24 *B. Askeland,* Prinsipp og pragmatisme i erstatningsretten, in: G. Holgersen/K. Krüger/K. Lilleholt (eds), Nybrott og odling, Festskrift til Nils Nygaard (2002) 21–34, 23.

25 *Askeland* in: Holgersen/Krüger/Lilleholt (eds), Festskrift til Nils Nygaard 21–34, 23.

26 See *Askeland* in: Holgersen/Krüger/Lilleholt (eds), Festskrift til Nils Nygaard 21–34, 27; *S. Koch,* Der Ersatz frustrierter Aufwendungen im norwegischen Recht (2011) 130.

apt to construct and develop general private law principles to solve cases. In this way a loose, but functional system is established. Without a doubt there are many gaps between positive rules that a jurist has to fill as best he or she can. The legal method provides him or her with tools and devices for such an endeavour, for example, the above-mentioned »real considerations«[27]. A pragmatic version of *Dworkin's* constructive interpretation may be a way of explaining the approach[28]. The Norwegian approach may, in the terms of *van Dam,* probably be placed somewhere between the German systemised law and the English case-oriented and more pragmatic law[29].

2/16 Against this background the jurist will have a good sense of comprehensiveness looking at the system. When approaching a case, he or she may therefore be able to decide how the function should work best in the individual case. He will be aware that the main purpose of tort law is to compensate the victim, primarily economically, whereas other private law institutes must be applied in order to achieve a disgorgement of profit. In principle, one might say that the Norwegian system to a large extent features possibilities for reaching a proportionality between the prerequisite of a legal rule and the effect of the rule. Hence, if there is wrongfulness, but not fault, on the part of A, he may be compelled to disgorge instead of make compensation.

C. The all-or-nothing approach and its exemptions

2/17 The all-or-nothing approach is to some extent embedded in the system as one of few firm points to heed when making a decision. An important reason for the all-or-nothing approach is the development of the doctrine of causation. This doctrine builds upon the theories of John *Stuart Mill*[30]. The influential writer of the early 20th century, *Fredrik Stang,* transformed *Mill's* theories of causation into tort law principles of Norwegian law. In particular the theory of equivalence has gained importance: a necessary cause, even if it is only a small part of the causal factors, is a cause of the whole damage – and the tortfeasor is liable for all the loss[31]. Once the threshold of being a necessary cause is passed, the tortfeasor behind the cause is liable in full, though sometimes in solidarity with his fellow tortfeasor. As long as the causation rules are dominated by this view, there are constraints on the possibilities of contradicting solutions. The approach is very dominant in respect of

27 See no 2/1 ff.
28 See on *Dworkin's* constructive interpretation, eg, *R. Dworkin,* Law's Empire (1986) 225 ff.
29 *C. van Dam,* European Tort Law² (2013) 132 f.
30 *J.S. Mill,* A System of Logic, London (1898).
31 *F. Stang,* Skade voldt av flere (1918) 9.

the »Vorverständnis« of tort law jurists, and it is therefore hard to gain acceptance for radical solutions such as proportional liability[32].

2/18 The principle of all-or-nothing is, however, attacked by mechanisms that provide for a reduction of the claim so that the claimant must bear some of the loss himself. The rule of comparative fault and reduction of the loss on the basis of the victim's contribution to the damage is one example (Skadeserstatninsloven [skl.] § 5–1). The reduction clause (skl. § 5–2) is also important in this respect (see the elaboration of this rule in no 2/145 ff below). It should be noted that the reduction clause is a provision prescribing a certain room for discretion. Such room does not exist in the uncodified areas of tort law. Hence, the all-or-nothing principle is often respected and considered decisive.

32 On proportional liability under Norwegian law, see no 2/61 ff below.

Part 2 The law of damages within the system of protected rights

I. Introduction

2/19 The idea of protected rights is not very explicit in Norwegian law. On a theoretical level, however, there are ideas about personal integrity and ownership of things and values. One pictures a sphere of interests that the individual possesses by virtue of his being a member of society and the legal order. If someone interferes with this sphere, without a legal basis to do so, compensation may be the sanction. The mere interference is, however, not enough in itself. The general system applies: one has to establish pecuniary loss or alternatively a legal basis for compensation for non-pecuniary loss.

2/20 As regards personal injuries, compensation systems other than tort are in fact more important means for protecting the victim's basic needs. Various compensation systems, such as insurance agreements or social security benefits, are politically desired solutions for securing the victim. Within the social democratic way of thinking, there is clear solidarity between members of the community deeply embedded in the political culture. Such solidarity may very well – in the terms of *Kaarlo Tuori's* multi-layered system of law – be described as a part of the »deep structures« of law in the Norwegian community[33]. In this societal, cultural climate, security nets of compensation have great legitimacy. There are good compensation systems for patients (close to strict liability, full compensation), for victims of crime (compensation with a cap of 40 G – approx € 430,000), for victims of car accidents (strict liability, full compensation). Most important is, however, the social security system, which aims at granting victims of certain kinds of severe health deterioration adequate compensation. The main requisite is that the citizen has an »illness« (»sykdom«) in the eyes of the law. If so, qualification for further requisites will result in payment of social security benefits. As for social benefits compensating loss of income, the victim is granted as much as 60 % from the social security system. After the new revision of the system, many citizens will qualify for compensation equivalent to 66 % of their income. The calculation system is, however, constructed in a way that leaves the victim with less income in many cases because the compensation is based on the income of the best three of the five

33 *K. Tuori,* Critical Legal Positivism (2003) 147 ff. For theoretical purposes this Finnish author divides the legal systems into three layers; surface layer, a layer of legal culture and the deep structures of law.

years preceding the illness or disability constituting the right to benefits[34]. Still, it is fair to say that society takes good care of citizens, something that »oils« the system[35]. The current discussions concern which heads of compensation should supplement the social security benefit system[36]. In the last few years the discussion has revolved around whether the victim should be compensated for loss of housekeeping capacity and, for example, the loss of the ability to bring up children with special qualities following from the day-to-day relations between parents and children. The tort law debate is, on the one hand, elaborated on a level that suits a highly civilized society. On the other hand, one cannot avoid thinking that some claims are based on an unhealthy mentality of claiming money for every conceivable situation that is perceived as negative from the victim's point of view. Still, there is after all a strong sense of justice at the root of the reasoning in favour of the claimants. Harm should be compensated as far as possible.

As for the other areas of law related to tort law, the analysis of Germanic law **2/21**
in Basic Questions I, chapter 2, contains reflections and outlines that are both relevant and valid to tort law, for example, the interplay between tort law and criminal law or insurance law. Other parts of the set of protective rules mentioned have especially designed provisions that make up an equivalent to the Germanic system presented.

II. Examples of supplementing rules

In addition to the classic tort law rules, there are special rules for special problems. **2/22**
For example, under Norwegian law there is a codified right to *self-defence* (see skl. § 1–4 second sentence). When a victim is attacked, he may defend himself even at the expense of the tortfeasor without having to pay damages. The question of excess has, however, not been discussed within the doctrine. Another example is the set of special rules on *creditor avoidance* within an Act of creditor satisfaction. The classic »actio Pauliana« is codified in »Dekningsloven« (dl.) § 5–9[37]. The provision has several cumulative and alternative requisites related to the act of the debtor. If he, for example, in an unacceptable manner pays one selected creditor to the detriment of

34 See the new proposal for a social security law, Proposisjon til stortinget (forslag til lovvedtak) (Prop.) 150 L (2010–2011).

35 Of course the word »oil« is carefully chosen in this context. The very basis of the smooth Norwegian system is the national prosperity achieved by exploiting the natural resources of oil underneath the North Sea.

36 A propos, the above-mentioned system of tort law supplementing the public financing of securing the basic needs of the citizen.

37 Dekningsloven (Creditors' Security Act, dl.) 8 June 1984 no 59.

the other creditors and he knows or ought to have known that their financial state was significantly worsened by the act, the disposition is declared void and the assets must be brought back to the estate of the debtor. The provision in dl. § 5–12 prescribes a reimbursement of the full value of the assets being subject to avoidance, hence the bankruptcy estate is entitled to claim the loss of the estate covered, provided that the creditor benefiting acted in bad faith. If the profiting party acted in good faith, however, the claim is limited to the remaining gained asset of the creditor[38]. In this way there is a sort of proportionality between the requisites and the sanctions. In the case that the requisites mentioned are not met, the creditor may always fall back on the general tort law rules[39]. Creditor avoidance has historically been categorized as a claim in tort, and the culpa rule is not abolished only because a certain provision securing the creditor's position has been enacted.

2/23 As for *injunctions* there has never actually been a comprehensive doctrine developed within Norwegian private law. There are, however, fragments of injunction rules in different areas, such as neighbours' law or the law of house rental[40]. These are provisions prescribing that a party is not entitled to carry out some particular activity and that he is compelled to respect the other party by omitting to do what he may desire. This occurs most often as a reflection of the right of the holder of some kind of property right. There are many such rules within the area of private law and it will not be of much interest to refer to them all in detail. An account of the general system may be formulated as follows: the possibility for a party to obtain an injunction against another party depends on whether there are economic sanctions available in the area of law. Sometimes the economic sanctions may be converted into an injunction. In addition there are certain procedural rules in the law of execution that will help a party to obtain the same effect as an injunction. For example: if A sees that B is building an unstable wall in his garden adjacent to A's patio, then A may sue B, claiming a »midlertidig forføyning« (»temporary injunction«) which means that B has a duty to stop building, otherwise A may get help from the police to make B heed the injunction[41]. In an ordinary case for the civil court, a judicial decision may be taken deciding the rights or duties of a citizen (»fastsettelsesdom«) confirming that B does not have a right to build the wall by virtue of A's property rights. The claim for a temporary injunction revolves on proving that it is more probable than not that A has such a right that must be respected by B[42].

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38 See dl. §§ 5–2, 5–8 and 5–11.

39 *M.H. Andenæs,* Konkurs (2009) 352.

40 See Grannel (»Act on Neighbour Relationships«) 16 June 1961 no 15 §§ 61, 10 and 11; Husleieloven (»Act on House Renting«) 26 March 1999 no 17, chapter 9.

41 See Tvangsfullbyrdelsesloven (»Act on Public Execution«) 26 June 1992 no 86, chapter 13.

42 *E. Monsen,* Forbud og utbedring ved overtredelse av unnlatelsesplikt, Tidsskrift for Rettsvitenskap (TfR) (2011) 478–522.

Thus, if the victim's property rights are threatened, he may refer to the legal system for assistance by claiming a »midlertidig forføyning« – a temporary restriction of the tortfeasor's act that fulfils the same function as injunctions known to common law. The main requisite and challenge for the victim is to prove that he is more likely than not subject to an infringement of his property rights[43]. If such a condition is fulfilled, the court will reach a decision that allows the victim to use the power of the legal system for execution of his rights. This means, for example, that he may have the assistance of the police in order to retrieve his good or to stop an activity that amounts to a nuisance[44]. Afterwards, the claimant may have to prove his right in court by using the ordinary system of litigation. 2/24

III. On the law of unjust enrichment

Under Norwegian law there are no strict boundaries between tort law and unjust enrichment. Nonetheless, for a long time scholars have recognised that tort law cannot fulfil the same function as special rules on unjust enrichment. In 1919 the influential theorist *Fredrik Stang* already pointed out that tort law was not a legal basis upon which to claim that a defendant has to pay restitution or a disgorgement following his infringement of the victim's property right[45]. Tort law could not be a legal basis for anything but a payment of compensation for pecuniary and to a certain extent non-pecuniary loss. These insights were renewed in a more recent theoretical work by *Erik Monsen,* where the legal basis for claims of restitution and disgorgement of profit was thoroughly examined[46]. *Monsen* holds that said claims must be established outside the »paradigm of tort law«[47]. The law of unjust enrichment has certain principles that find support in certain statutory provisions, but nonetheless a clear and broad principle of disgorgement of profit has not yet been established[48]. 2/25

Although a distinction between tort law and unjust enrichment has been made by theorists, the Supreme Court has not always respected the distinction. The Supreme Court sometimes labels claims that are actually about unjust enrichment as tort claims (see Rt. 1981, 1215, the *Trollheimen judgment).* An owner of a flock of reindeers knowingly let the animals graze on another man's land for several years. A claim for restitution due to the fact that the former had unlawfully 2/26

43 See Tvisteloven (tvl.) 17 June 2005 no 80 § 34–2.
44 Tvl. § 34–4.
45 *Stang,* Erstatningsansvar (1927) 384 f.
46 *E. Monsen,* Berikelseskrav (2007).
47 *Monsen,* Berikelseskrav 27–30.
48 See on this *Monsen,* Berikelsekrav 337–421.

used property for reindeer was labelled a tort claim. At the same time it was clear that the claim was based on what would be a reasonable payment for the use of land, not the actual loss on the part of the landowner. The decision gave rise to a special principle: one who knowingly uses another man's things or property for his own purpose should as a general rule pay a reasonable rent for the use.

2/27 This is one of several decisions which, together with a series of provisions in various private law Acts, form the legal basis of restitution for unjust enrichment within Norwegian law[49]. *Monsen* has argued that the many positive decisions and provisions within Norwegian law constitute bases for general principles of the kind mentioned above in connection with the reindeer case. Another such principle is related to the copying of products for sale: *Monsen* maintains that one who copies another man's work should pay disgorgement of the profit he has gained by doing so.

2/28 The overall impression is that the question of restitution is not really a threat to tort law rules or vice versa. The fact (and the recognition of the fact) that claims are motivated and assessed in different ways seems very clear to lawyers and academics working in this field of law[50].

2/29 Interference with other citizens' rights and property may amount to a tort, hence the victim is in a position to claim recovery of his loss. Sometimes the interference leads to a profit for the interferer, typically when someone uses another man's work of art or idea. The important question is whether in such cases there is a legal basis for claiming disgorgement of profit. It is important to note that the assessment of damages in tort law does not allow for such claims. The solution may, however, be acceptable based on some special provisions on the protection of property in various situations[51]. *Monsen* argues that a general principle should be recognised that prescribes disgorgement of profit for anyone who exploits other people's work or property in order to gain profit[52]. To date the Supreme Court has been rather reserved and there are no traces of such a development within the court practice.

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49 An important rule is Lov om hendelege eigedomshøve (»Act on Coincidental Ownership«) 10 April 1969 no 17 § 15, prescribing that one who knowingly profits from using another man's property must pay the profit to the owner.

50 The distinctions of functions, legal bases and assessment rules are presented and discussed in a comprehensive manner in the above-mentioned thesis by *Monsen,* Berikelseskrav.

51 See eg Lov om hendelege eigedomshøve § 15, Sameieloven § 9 and Selskapsloven § 2–23.

52 *Monsen,* Berikelseskrav 339 ff.

IV. On the coherence problem addressed in Basic Questions I

The concerns raised by *Koziol* in Basic Questions I that the system be coherent and that the various principles and rules are not used for purposes or functions other than those initially intended, are also important to Norwegian law. The sense of order, the need for sound distinctions and caution in the application of various sanctions is an issue of justice for citizens. The academic approach to tort law should be conscious of the role tort law plays in the interplay of rules protecting property rights and other rights of citizens. As for Norwegian law, the somewhat pragmatic approach as well as the historical development of tort law, however, leaves a different picture of the system than the Germanic survey. To a certain extent tort law serves both as an origin of other remedies and as a sort of security net – a guarantee for a possibility to reach reasonable solutions in concrete cases. There has not been any articulated fear that the solutions based on other sets of rules contradict or undermine tort law. Perhaps one of the reasons is the methodological approach of Norwegian private law. Although the government at one point in time had ambitions regarding a book of civil law, these have never been carried out. Only fragments of positive law have been enacted at various times and with no actual comprehensive approach. Hence, the ideas of coherence and comprehensiveness have been left to judges, to some extent guided by a few well known books on private law. This approach has left tort law as a sort of background law, a set of principles that may amend any kind of deficits within other areas of law[53]. Part of the reason for this is that, according to the historical view of private law, contract and tort were the two possible geneses of money claims[54]. A well-educated jurist, who knows his private law, will have the possibility to adjust prerequisites and effects in an intelligent and proportionate manner. If a case concerns the exploitation of another's commodity without paying an appropriate fee, the open rules on unjust enrichment make it possible for the commodity owner to claim the payment of the gain he made, regardless of whether he has suffered a loss that will qualify according to tort law principles. Appropriate solutions are also available for vindication (rei vindicatio) and regarding preventive expenses. **2/30**

The approach seems to function well as far as the development of private law is concerned. The drawback is of course that the rather free and unchained approach to such questions sometimes features a lack of foreseeability. On the other hand, the system provides for a possibility to produce tailored decisions. Jurists in general do not misuse tort law, rather they apply it as a tool for fair and just decisions. The jurist will, for example, know that criminal law will take care of preven- **2/31**

53 See the notes on a comprehensive methodological approach in no 2/15 f above.

54 *P. Augdahl,* Den norske obligasjonsretts almindelige del[5] (1978) 2.

tive aims and that there are rules of self-defence embedded in the tort law rules[55]. In the uncodified private law principles there is a clear principle of res vindicatio. Thus, there are good possibilities to achieve just results without twisting or bending the tort law rules. *Koziol's* other concern is that the idea of compensating the damage and nothing more is deviated from in favour of punitive damages, which may go beyond the purposes and functions of tort law. An important point is that public law should have the task of performing penal functions, whereas tort law should not be overburdened with such a task. As for Norwegian law, this does not seem to be an immediate threat. The limits set by the requisite of pecuniary loss are almost never transgressed, although scholars in recent years have advocated a more instrumental approach to tort law, advising that monetary sanctions should be imposed in order to achieve various preventive effects[56]. An assessment along these lines is advocated in theoretical works concerning unjust enrichment and infringements of intellectual property rights[57]. The Supreme Court has, however, never assessed damages in tort law cases in a manner which includes punitive damages or otherwise resorted to a purely discretionary approach.

55 See skl. § 1–4.

56 See *O.A. Rognstad/A. Stenvik,* Hvor mye er immaterialretten verd? in: K.S. Bull/V. Hagstrøm/S. Tjomsland (eds), Festskrift til Peter Lødrup (2002) 512–548 and *E. Monsen,* Rekkevidden av erstatningsvern for tap og ulempe som følge av formuesskade, Jussens venner (2010) 1–68.

57 See especially *Monsen,* Berikelseskrav 303–329.

Part 3 The tasks of tort law

The main purpose of tort law is to provide for a system that compensates the victim. The so-called »idea of reparation« is perceived as profound and is represented in many aspects of tort law rules. One important such expression of the idea is the principle of »compensation in full«. The victim should economically be restored to the position that he would have enjoyed had the damage not occurred. There has been a certain disbelief in the idea of prevention within Scandinavian law[58]. A variation of this attitude is the idea that there are mechanisms other than the threat of monetary sanctions that motivate people to not injure others[59]. Leading scholars have simply not believed that the fear of an economic sanction can motivate private citizens to act carefully. The opinion has rather been that the private citizen will try not to harm his fellow citizen for other, more altruistic and ethical reasons. Hence the predominant view has been that the tort law rules will not have any preventive effect in themselves[60]. This stance has been paired with an almost similarly outspoken confidence in insurance-based solutions[61]. The latter has also been developed in an environment dominated by high ambitions for providing welfare for citizens. A symptom of this way of thinking is that the social security funds – as mentioned above – can no longer file a recourse action against the tortfeasor for social benefits that actually cover the damage caused by the tortfeasor[62]. **2/32**

Alongside the views mentioned, there has also been a belief in ideas of »economic prevention«, especially concerning the organisation of security systems in business activities. It is held that, if factory and other business owners are held liable for the damage they cause, they will implement security measures, hence a preventive effect is the result. At this point, the ideas of prevention are to a certain extent influenced by law and economics[63]. The insights of law and economics have otherwise played a rather modest role in the realm of tort law thinking. **2/33**

58 See especially *F. Bladini,* Preventionstanken i den skadeståndsrättsliga utvecklingen, in: B. Dufwa et al (eds), Vänbok till Erland Strömbeck (1996) 55–64.

59 *P. Lødrup,* Lærebok i erstatningsrett (2009) 113.

60 See *Lødrup,* Lærebok i erstatningsrett 112–115.

61 These ideas emerged in the fifties; see an important work of the Swedish researcher *Ivar Strahl,* the public investigation SOU 1950: 16 Förberedande utredning angående lagstiftning på skadeståndsrättens område. The work has influenced later development in Sweden and Scandinavia, see on this *J. Hellner/M. Radetzki,* Skadeståndsrätt (2006) 49 f.

62 Previously there was a legal basis for such recourse action, but this was removed by an Act passed in 1970; see Om lov om endringer I lov om folketrygd, 19 June 1970 no 67.

63 *Lødrup,* Lærebok i erstatningsrett 116–119.

Only a few scholars have addressed such issues, and there are very few comprehensive works on the subject within tort law[64]. The prevailing view seems to be that law and economics operates with too many simple and general presuppositions and that the rationality of law and economics does not capture the moral questions that are inherent in tort law. Still, in certain areas the insights of economics can no doubt be helpful; however, not as a replacement for tort law but only as a supplement to tort law reasoning. The notion of continuation of a right (»Rechtsfortsetzungsgedanke«) has no accurate or immediate equivalent within Norwegian law.

64 See *E. Stavang,* Naborettens forurensningssansvar (1999) and *T.-L. Wilhelmsen,* Årsaksspørsmål i erstatningsretten (2012).

Part 4 The area between tort and breach of an obligation

The boundaries between claims in contract and in tort are quite unclear. There have historically been attempts to clarify the difference, but modern theorists seem to maintain that the difference is not so important[65]. The distinction may also be of minor importance because the claimant anyway may choose whether he wants to build his monetary claim on a contractual or delictual basis. The claimant will sometimes choose to base his claim on both, for example, principally in contract and subsidiarily on the law of torts. **2/34**

In some contractual areas there is a tradition that claims are based on delict, typically personal injuries which occurred during the performance of a contractual duty. On other occasions the fact that the claimant has a contract serves as an additional argument, among others, to decide the case on a delictual basis[66]. This is particularly evident in cases of employers' liability. The fact that there is a contract between the employer and the claimant is relevant to the judgement concerning how far the scope of liability reaches[67]. On this point there is also room for tailored decisions, where the special merits of the case may be thoroughly examined. **2/35**

The categorisation of constellations in the interim area is interesting from a scholarly point of view. There have not been any attempts at corresponding systemisation within the Norwegian and Scandinavian doctrinal literature. The problems of the interim areas seem rather to be addressed only where the existence of the contractual elements is relevant in a concrete context. At the same time there are interesting academic works that challenge the interim areas. According to Norwegian law, a potential contractual party who causes a loss to his possible future contractual partner is liable in tort, still with an eye to the special impact of the possible contract[68]. The responsibility for auxiliaries may be affected by neighbour relationships between the principal and the victim. Hence elements of a sort **2/36**

65 See eg *E. Hjelmeng,* Revisors erstatningsansvar (2007) 18–22 and *V. Ulfbeck,* Erstatningsretslige grænseområder. Profesjonsansvar og produktansvar (2004) XIII.

66 See eg *Nygaard,* Skade og ansvar (2007) 186; the contract between the tortfeasor and the victim speaks for liability on the basis of the culpa rule.

67 This point was put to the fore quite recently by *M. Strandberg,* see *idem,* Arbeidsgiveransvar for forsettlige skadeforvoldelser, Jussens venner (2012) 33–67, 56 ff. See also *B. Askeland,* Erstatningsrettslig identifikasjon [Identification within tort law] (2002) 77 f.

68 See eg *L. Simonsen,* Prekontraktuelt ansvar [Pre-contractual liability] (1997).

of contractual relationship between two neighbours are relevant to the question of vicarious liability.[69]

2/37 Norwegian doctrine seems to have an open approach to the interim areas. There is a danger that the relevant perspective of a case is not taken into account because the court focuses on one of the approaches. An example is that court decisions on employers' liability have been criticised for not paying attention to the contract involved[70].

2/38 A crude outline of the difference between claims in delict and claims in contract may be given thus: liability in contract is stricter, often operating with culpa with a reversed burden of proof or strict liability – or most often something close to strict liability[71]. At the same time there is liability for fault in the case of auxiliaries in their performance of a contract, whereas there is no liability for the faults of an independent contractor. Lastly, it is in general easier to obtain compensation for pure economic loss in contract than in delict. There is a well settled doctrine on compensation for loss of profit, and such compensation also has a legal basis in sales law, which forms a sort of model law for many contractual relationships[72].

69 Rettens gang (RG) 1993, 740, see also *Askeland,* Erstatningrettslig identifikasjon (2002) 170 f.

70 See eg *K. Krüger,* Norsk Kontraktsrett (1989) 208 and 793 and *V. Hagstrøm,* Utstrekningen av arbeidsgiveransvaret ved straffbar skadeforvoldelse (2008) – Høyesteretts dom 28. mai 2008, Nytt i privatretten no 4 (2008) 5–7.

71 See eg the liability clauses in many acts concerning special contracts, such as Håndverkertjenesteloven 16 June 1989 no 63 § 28 and Vegfraktavtaleloven 20 December 1974 no 68 § 28.

72 See Kjøpsloven 13 May 1988 no 27 § 67.

Part 5 The basic criteria for a compensation claim

I. The basic criteria related to damage

A. Introduction

The basic criteria for a compensation claim under Norwegian law are quite similar to the Austrian criteria; however, they are not very clearly embedded in statutory legislation. The criteria are above all based on long-standing and consistent court practice. The main criteria are that there has to be damage »relevant to tort law«, that there must be a ground for liability and that there has to be a causal link between the factual act or condition that constituted a ground for liability and the damage. **2/39**

B. The concept of damage

The notion of damage relevant to tort law is really a phrase that refers to a set of normative, value-based guidelines upon which incidents or changes in the victim's position qualify for compensation. For several reasons the boundaries of the concept of damage within Norwegian law are not very clear. For a Norwegian lawyer reading the theoretical works of Germanic literature, it is noteworthy how poor the Norwegian law is on exactly this point. The standard text books have only addressed the questions in a superficial way, leaning on older theoretical works produced for another time and other societal and cultural conditions. However, some of the problems have been addressed in recent years, although there is a certain lack of comprehensiveness in the approach[73]. **2/40**

The concept of damage and the more detailed criteria for compensable damage follow lines resembling those put forward in *Koziol's* account (in Basic Questions I) of damage in Austrian law, however with a more crude and open, and also somewhat loose approach. A starting point is that the victim must have suffered some kind of »realskade«, directly translated this means »real damage«. The concept is defined as a »negative effect«[74]. If this effect is loss of money or a negative **2/41**

73 *E. Stavang,* Erstatningrettslig analyse (2007); *E. Monsen,* Om rekkevidden av erstatning for tap og ulempe som følge av formuesskade, Jussens venner (2010) 1–68; *B. Askeland,* Erstatning for preventive utgifter, TfR (2010) 1–72; *B. Thorson,* Ren formuesskade (2011); *Koch,* Der Ersatz frustrierter Aufwendungen.

74 *Nygaard,* Skade og ansvar 59.

effect upon a property that may be assessed in money, there is a pecuniary loss; hence there is no doubt of relevance and compensability. The same is true for expenses caused as a result of the acts of the alleged tortfeasor.

2/42 Doctrinal problems and difficulties for case law begin to emerge whenever there is a kind of negative effect that is difficult to measure in money. Borderline cases are, for example, the shooting of wild geese, so that the government had to release new geese into the environment (RG 1979, 715) or loss of use[75]. The question of whether the damage is calculable may or may not be of importance in borderline cases. There are no clear rules on this point.

2/43 In some areas the Supreme Court has, however, established a quite consistent practice, to a certain extent guided by the decisions of the European Court of Human Rights. The provision in skl. § 3–6 is a legal basis for compensating the infringement of the private life of a victim. Recently there has been a series of cases regarding press coverage of private situations, such as the wedding of a pop star and an actress that took place on a little island on the coast, where paparazzi photographers uninvitedly took pictures of the ceremony[76], and the case of two reality stars who became a couple in a 24-hour filmed house (Big Brother) but later broke up, claiming that this was not a matter of public concern[77]. The reasoning in these cases follows the arguments of the *Caroline von Hannover* case in the ECtHR. In the first case the press was acquitted, whereas the reality stars received compensation of NOK 50,000 (€ 6,000).

C. A »value based« (»normative«) delimitation of the concept of damage

2/44 Even if it is possible to calculate the damage, there may be other problems relating to the qualification of the negative effect. The normative approach to this kind of problem is well illustrated in the case of the failed sterilisation of a woman who subsequently gave birth to a child whom she initially did not want to have (Rt. 1999, 209). The Supreme Court simply stated that the question of compensating the expenses of raising a child was normative and value-based. In consideration of the child, the parents themselves and of society, the Court found it best that such expenditure should not be compensated – the birth of a healthy child should not be regarded as damage relevant to tort law.[78] The solution may be worth support-

75 See an elaboration of this problem in *Stavang,* Erstatningsrettslig analyse 101–158.

76 Rt. 2007, 687. The case is referred to in *B. Askeland,* Norway, in: H. Koziol/B.C. Steininger (eds), European Tort Law 2007 (2008) 441 f.

77 Rt. 2008, 1089.

78 This view has been upheld in a new, similar case, Rt. 2013, 1689. The judges were, however, divided, 3–2.

ing, but the reasoning is not very clear or principled. Still, the case shows that that what is a negative effect must be decided on the basis of what society in general would regard as negative.

The normative and sometimes pragmatic approach to profound principles **2/45**
makes it easy to reach a sound result, and Norwegian courts therefore seldom need to apply complicated constructive arguments in order to fit the case into existing categories. Perhaps this is why – in the case of wrongful birth – the idea of reducing damages due to benefits received has not been aired. In addition, under Norwegian law, the principle of »compensatio lucri cum damno« has been perceived as exclusively regulating pecuniary loss. The transfer of the thought to non-pecuniary loss would, however, be understandable to the Norwegian debate and may easily be presented as a supplementing argument to the existing solution of no recoverable loss. In fact, the idea that having a child is a positive event, and hence should be regarded as some kind of advantage in the eyes of the law, is already expressed in the Norwegian debate on the subject, however not with a link to »compensatio lucri cum damno«[79].

The idea of compensation for frustrated family planning would, however, **2/46**
have no solid ground in Norwegian law. Such frustrated expectations are neither a pecuniary loss nor an infringement that has a legal basis in statutory law. Hence, there would not be any legal basis for compensation. Even though the concept of damage and the boundaries of compensable loss have been discussed lately, there is probably no room for compensation on the mere grounds of interference with family planning choices.

D. Non-pecuniary loss at the border of the concept of damage

For a long time it was taken for granted that only pecuniary loss should be com- **2/47**
pensated unless there is a statutory basis for compensating non-pecuniary loss[80]. In recent years this doctrine has been challenged on varied lines of reasoning. Several scholars have suggested that compensation should be awarded based on principles of reasonableness, although they have failed to produce any coherent or principled guidelines in order to assess what does and what does not qualify for compensation[81]. When such claims are brought, the traditional concept of damage is challenged.

79 See eg *A. Kjønstad,* Erstatningsretten i utvikling (2003) 388.
80 See *F. Stang,* Erstatningsansvar (1927) 361 f and *J. Øvergaard,* Norsk erstatningsrett (1951) 285.
81 See eg *Stenvik/Rognstad* in: Bull/Hagstrøm/Tjomsland (eds), Festskrift til Peter Lødrup (2002) 512–548.

2/48 There are several cases concerning expenses incurred in order to diminish the negative consequences of damage to a non-pecuniary interest or value: a woman was awarded damages as compensation for rental car expenses she incurred to enable her to have her holiday with her family as planned[82]. In this case, the Supreme Court acknowledged that the value of having a holiday was not a pecuniary interest per se. Still, they argued that deprivation of the possibility to have a holiday as planned might amount to a compensable damage.

2/49 On the other hand, property owners who wanted to build a wall to protect themselves and their property against noise from a motorway were not awarded any compensation for the expenses they incurred[83]. Although there was damage to a physical thing (the car) in the first case and only reduced enjoyment of a property in the second case (because of the noise), it is hard to draw the line between values that are protected by tort law and those not protected. The Supreme Court may have stated the law too broadly when it held that any expense incurred in order to repair or prohibit damage is to be compensated[84]. In fact the decision rests on very concrete arguments or fragments of theories that are internationally known as the doctrines of commercialisation and frustration (Frustrationslehre). The advantage of this state of law is that one will be able to reach a sound result in the concrete case at hand. On the other hand; such an approach leaves little foreseeability in this field of law.

2/50 The Norwegian doctrine has not yet found any good solution to the problem of the boundary between pecuniary and non-pecuniary loss. The closest to a criterion is the idea that values that are supported by most members of society should be protected by a tort law based sanction – compensation to the victim. In my opinion such an approach seems somewhat simple and based on discretion. The question ought to be investigated by a law committee with the task of rethinking the concept of damage in the light of modern developments.

E. Special remarks on non-pecuniary damage

2/51 Since there has never actually been any legal basis for punitive damages under Norwegian law, one may look for elements of such a remedy in areas where the legal basis of compensation allows punitive elements to be taken into account. At this point, the legal basis of non-pecuniary loss comes to the fore. There is a special legal basis for compensating non-pecuniary damage under Norwegian law (see skl. § 3–5). This provision reads that pain and suffering caused by gross neg-

82 Rt. 1992, 1469.
83 Rt. 1980, 389.
84 Rt. 1996, 1472.

ligence or intent may be compensated by an amount assessed at the discretion of the court. The Supreme Court has, however, established a consistent practice on the most common types of injuries, such as homicide and rape and various violent infringements of physical integrity. In such cases awards are to some extent standardised by the court practice[85].

2/52 Historically, an important reason for compensating non-pecuniary loss was the penal effect of economic sanctions[86]. An interesting development of recent years is that the Supreme Court has expressly moved the focus of attention from the original penal function to a more outspoken aim of compensating the victim[87]. The idea of actually compensating a bad experience, fear, pains or bereavement by money has come more to the fore. In past decades the recognition that some negative effects are impossible to compensate and to measure by economic standards constrained the willingness to compensate. In many decisions from the last years, one can, however, observe a tendency to compensate for the negative non-pecuniary effects by monetary awards. A consequence of this change of view is that the awards have risen substantially. A peak seems to have been reached in a recent case, where a person was shot twice in his torso and became severely disabled for the rest of his life with continuous pain. The award solely for non-pecuniary loss was € 70,000, an amount which clearly exceeds earlier levels[88].

2/53 The picture is, however, blurred by the fact that the Supreme Court has a methodological principle of using the level of penalties within criminal law as a guideline for awards. The level of penalties has increased substantially over the last years mainly due to preventive aims. The level of penalty – the length of the criminal punishment – is a parameter for the discretionary assessment of compensation for non-pecuniary loss. This fact means that the gravity of the act indirectly has a great impact on the amount of the award, apparently in a way that resembles the idea of punitive damages.

2/54 In this area of law, the many compensation cases brought by young people who were injured in the Utøya massacre in 2011 have had an influence. The office administering the Victims of Crime Compensation Scheme was overruled by an appeal to the Board of Compensation for Victims of Crime (»Voldsoffererstatningsnemnda«). The Board granted the victims higher awards than previous practice suggested, by reference to the very special circumstances of the violent acts (the great fear and the horrific experiences). This was probably a wise decision.

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85 The latest adjustment of this practice is found in Rt. 2010, 1203 (€ 25,000 for homicide) and Rt. 2011, 743 (€ 18,500 for rape).

86 See about the background *B. Askeland,* Punitive Damages in Scandinavia, in: H. Koziol/V. Wilcox (eds), Punitive Damages: Common Law and Civil Law Perspectives (2009) 116 f.

87 See the cases Rt. 2005, 104; Rt. 2011, 769 and Rt. 2012, 1773. See also *V. Hagstrøm/A. Stenvik,* Erstatningsrett (2015) 522 f.

88 See the case Rt. 2012, 1773.

The effect is, however, that the general level of awards will increase. The Supreme Court has in other cases looked to the practice of the Board[89]. It is therefore likely that the Utøya decisions will eventually have an impact on the Supreme Court practice.

F. Future perspectives

2/55 In my opinion there is a certain logic to the fact that non-pecuniary damage is better compensated now than previously was the case. As the level of civilisation and welfare has increased within western culture, citizens have greater expectations as regards a good and comfortable life. And as opposed to the attitude of earlier times, a citizen of a welfare-based legal order will, to some extent, take the fulfilment of a good life for granted. A reflection of this development is a demand for compensation for any frustration of the expected good life. Of course this demand will also comprise non-pecuniary damage. A victim may find it very hard to grasp why he should put up with devastating acts or great pain with no or only symbolic compensation. A consequence of this development is that a higher level of compensation than before is, in the eyes of the population and the law-making institutions, legitimate.

2/56 The same effect may partly explain the quest for a new head of damage within Norwegian law. The law committee preparing the new draft on standardised personal injury awards was, practically formulated, instructed by the government to suggest a provision on compensation for pain *(Smerteerstatning)* using Danish law as a model. It has for some time been a debatable point in Norwegian tort law that an uncompensated victim must tolerate being ill or suffering pain in cases where the tortfeasor only acted with negligence or where there is strict liability. The suggested new provision in the 2011 Draft is that a victim should be awarded a daily compensation amount for pain or sickness of 0.007 G (approx € 75) for the first week, and thereafter 0.0025 G (approx € 27). The total compensation for pain should not exceed 1 G (approx € 10,750).

2/57 By way of these legal bases for compensation of non-pecuniary loss, there is probably no great pressure on Norwegian law to develop punitive damages through court practice, at least when it comes to tort law. The system of not granting compensation for non-pecuniary loss without a statutory legal basis seems to be strong and to meet the challenges of new times and new ideas. An element of punitive damages is more likely to be implemented in the law of unjust enrichment. It is unsatisfying that a person may exploit another man's work without his

89 See Rt. 2011, 743.

consent without paying more than the fee that he would have had to pay in a lawful agreement. There should be a punishment for breaking the rules and infringing another man's property rights[90].

II. Causation

A. Introduction

2/58 The Norwegian doctrine is based upon a »bifurcated approach« which is comparable to the system both in Germanic law and in common law[91]. Firstly factual causation must be proved. Here the courts rely on the »but-for test«, more commonly known as the »conditio sine qua non test«. The second step is to eliminate causes that have passed the but-for test but are so unsubstantial that they do not naturally constitute liability on the part of the tortfeasor. This is a normative qualification of the cause, which is sometimes hard to distinguish from the test of whether or not the cause is adequate. If the situation concerns a cause of minor importance in the whole picture of causes, the elimination of unsubstantial causes is the chosen procedure. If the question turns on a series of events following from the tortious act, for example, in »cable cases« (cases where electric cables have been destroyed, leaving many users of electricity without electric power), the courts are more apt to approach the question in terms of adequacy[92]. Textbooks often deal with the substantial test in connection with factual causation, and adequacy more distinctly as a normative limitation of liability. This is quite odd, because both the substantiality test and the adequacy test are based on strictly normative evaluations. Tradition, however, seems hard to alter.

B. Alternative causes

2/59 As regards alternative causes, the traditional doctrine has emphasised that a duty to compensate only exists where causation is proved more likely than not. The question is illustrated by an example of two men who pushed stones from a road and into a valley where a horse was grazing. If it is impossible to prove which of the two stones killed the horse, neither of the men will be liable. In modern theory,

90 *Erik Monsen* has argued eagerly for such a solution, see *idem,* Berikelseskrav (2007) 303 ff.

91 The expression »bifurcated approach« is used by Anglo-American scholars, see eg *H. L. A. Hart/T. Honoré,* Causation in the Law (1989) 88–94; *A. Becht/F. Miller,* The Test of Factual Causation in Negligence and in Strict Liability (1961) 2–7.

92 See Rt. 1973, 1268.

this solution is found to be less than satisfactory, and other solutions have been suggested. *Nygaard* points to the ethical blameworthiness of pushing rocks into the valley, and claims that solidary liability therefore is the best solution[93]. This approach resembles or is consistent with *Bydlinski's* view presented in Basic Questions I, no 5/79: because there is no proven causation, one may only deem the actor liable provided that there are strong arguments attached to other requisites, for example, the existence of blameworthiness. Recent theoretical comments have supported the solution presented in PEL Liab Dam[94]; solidary liability with a reversed burden of proof[95]. This solution is in fact also prescribed in the Pollution Act § 56[96]: whenever a potential tortfeasor may have caused the pollution, he is solidarily liable with other potential tortfeasors unless he proves that he was not the cause of the pollution. The fact that this solution is chosen in the area of environmental law and not elsewhere probably has to do with the fact that the aim of protecting the environment has a strong political standing in Norway. The fact that there is a statutory provision prescribing this solution makes it conceivable or even probable that this solution may also be chosen in other fields. This would, however, be a dynamic interpretation of the general tort law rules and principles as they stand today.

2/60 A variation of alternative causation is the hunters' case; three hunters shoot at the same time. An innocent person is hit by one of the bullets; it is, however, uncertain which of the three bullets actually caused the damage. According to the general rule, there is no liability here, because it is not more likely than not that any individual hunter caused the damage. There are, however, indications that the courts will attach weight to the fact that all three shooters are involved in a dangerous operation. Two prominent scholars would follow this line of reasoning at least where there are two shooters[97].

C. On proportional liability

2/61 The suggestions related to proportional liability would probably not be applied in Norwegian courts.[98] The solution and the way of thinking are alien to current

93 *Nygaard,* Skade og ansvar 346.

94 Draft Common Frame of Reference (DCFR) Book VI: Non-Contractual Liability Arising out of Damage Caused to Another (2009).

95 *A. Stenvik,* Erstatningsrettens internasjonalisering, TfE (2005) 33–61, 54.

96 Forurensningsloven 13 March 1981 no 6.

97 See *Nygaard,* Skade og ansvar 346 and *P. Lødrup* (with the contribution of *M. Kjelland),* Lærebok i erstatningsrett (2009) 343.

98 See the description of the Norwegian stance on proportional liability in *I. Gilead/M. Green/B.A. Koch* (eds), Proportional Liability, Analytical and Comparative Perspectives (2013) 249 f.

tort law. The ideas have not gained any support from contemporary scholars[99]. However, a law committee has applied this way of thinking and the special rationale in the course of setting up a new scheme for standardised personal injury awards. The committee has introduced lump-sum compensation for injured children, stipulating average personal loss of income from work after school and in holidays. Statistics are referred to in order to find out how many young people of a certain year of birth would get a part-time job and how much they would earn. When the standardised personal injury award is based on such factors, the logic really is that the size of the standardised award is based upon the degree of probability of a loss[100]. At the same time it is not actually proportional liability in the ordinary sense of the concept, which revolves around probability of causation, not probability of suffering a loss. Still, the rationale is the same: for the individual victim, his or her award is decided by the generally assumed probability that this child would be among those getting a part-time job when it reached an age between 13 and 20 years old.

A possible inference from this is that the idea of proportional liability broadly understood may in some of its facets be well suited for standardising awards. Once one leaves the concept of full compensation and replaces it with a crude standardised award based on different calculations and normative factors, it would be sensible to use statistics as a basis for assumptions on probability of outcomes. Subsequently, one may attach weight to the probability as a basis for the award. One may also see the approach as a variation of loss of a chance: the victim would have had a chance to get a part-time job had he not been injured. Now he instead gets compensation that reflects this chance. **2/62**

The concept of loss of a chance is hardly developed within Norwegian tort law. Only one theorist, *Strandberg,* has analysed the problem thoroughly[101]. He only finds traces of similar ways of thinking within Norwegian law. For the time being there is no authoritative legal basis for claiming damages for loss of a chance under Norwegian tort law. **2/63**

D. Cumulative causes

As for cumulative causes (Basic Questions I, no 5/111 f), the solution of solidary liability is quite clear due to an old case, *Vestfos,* Rt. 1931, 1096. Two factories (A and B) **2/64**

99 See eg *Nygaard,* Skade og ansvar 326 and *B. Askeland,* Tapsfordeling og regress (2006) 267.

100 See NOU 2011: 16 Standardisert personskadeerstatning 206–208.

101 See *M. Strandberg,* Skadelidtes hypotetiske inntekt (2005) 105–113. See also the report by *B. Askeland* in: H. Koziol/B. Winiger/B.A. Koch/R. Zimmermann (eds), Digest of European Tort Law I: Essential Cases on Natural Causation (2007) 579.

and a commune (C) were all polluting a river, poisoning drinking water for the local inhabitants living by the river. When sued, one of the factories (A) maintained that the pollution from the factory was not a cause of the damage because the river would have been polluted by the other polluters (B and C) even if A had stopped polluting. The Supreme Court dismissed the argument by stating that the fact that other polluters were also involved could not exonerate A. Hence A was responsible. The other polluters were not sued, but they would probably be equally responsible had they been sued. Solidary liability would be logically consistent with the outcome of the case.

2/65 It is interesting that the judge's reasoning did not really depart from the rule of conditio sine qua non. The main motivation for deciding solidary liability was the idea that otherwise all the three possible causes might have to be exonerated, a point that is articulately expressed in the wording of the decision. Suppose that both of the factories had stopped polluting, the commune would have continued polluting and as such been the sole cause of the pollution. Based on this line of reasoning, it is somewhat unclear how far the decision reaches. But even though it does not directly solve the classical concept of cumulative causation, it is a strong argument in support of solidary liability when cumulative causes are concerned. Partly because of the 1931 decision, the theory on the subject distinguishes between reversible and irreversible damage[102].

2/66 *Nygaard* solves the problem by using a theory of causation that departs from the doctrine of conditio sine qua non. His theory prescribes three requisites for causation: the alleged causal factor must have been present, it must have had the potential to produce the harmful result, and this potential must have been realised. By this test *Nygaard* accords weight to what really happened instead of a hypothetical inference of what might have happened had the causal factor not been present[103]. In the *Vestfos* case the test would provide for an inference of causation both on the part of the factory and the commune.

2/67 The special reasoning in the *Vestfos* case, may, however, not be applied to cases of superseding causes, the classic example being when an alleged tortfeasor shoots a horse after it has been fatally hit by a car. If the horse is already dead, there is no liability on the part of the shooter. A more complicated example is that A shoots to kill B at a point in time where B has already been poisoned by C and is doomed to die within a few hours anyway. For a long time there has been a debate on how this problem should be solved[104]. *Nygaard* holds that both tortfeasors

102 *Nygaard,* Skade og ansvar 334.

103 The test has many similarities with the NESS test, as presented by *R. Wright,* see eg *idem,* Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility, 54 Vanderbilt Law Review 1071–1077. The theoretical ideas are, however, developed completely independently and without knowledge of *Wright's* works.

104 See eg *J. Andenæs,* Konkurrerende kausalitet, TfR (1941) 258–268.

should be liable. He refers to his theory of putting weight on which causes were in fact active and thereby realized their potential: both causes did in fact at one point actively have an impact on the victim with the potential to lead to his death[105]. De lege lata probably the *Vestfos* case, and the tradition of solidary liability in cases where two or several tortfeasors are involved, will serve as supporting arguments for deeming both tortfeasors liable.

E. Superseding causes

Problems of superseding causes have been discussed for a long time under Norwegian law, and it seems that these have now been settled. If the first causer has caused a finalized non-reversible damage, he will, however, be responsible in full for the entire damage. The second causer will not be liable at all[106]. The textbook example is that the first causer shoots a horse which dies. A variation of the problem is that A poisons B so that he eventually will die, but C shoots B fatally before the poison has killed him. In this scenario most theorists hold that both A and C are liable[107]. **2/68**

A principle of superseding causes is also applied when assessing personal injury awards. A tortfeasor is only liable for loss of income (or other heads of damages) as far as the income would have been gained in the normal course of events. If the victim, for example, had a disposition to being ill and would not have worked after the age of forty, the tortfeasor should only pay relevant damages for the time period until the age of forty[108]. **2/69**

F. On causation in joined acts

A case where A has a lookout role while B and C break into a store causing damage raises special issues within Norwegian tort law. If nobody comes around, the conduct of the guard (A) is not a conditio sine qua non for the damaging act. Still, he may be liable. Doctrine has traditionally suggested two solutions to the problem: firstly, the guard may psychologically have influenced B and C, inducing them to perform the damage, strengthening their intent[109]. In this way scholars have tried to construct a situation where the conduct of alleged tortfeasor A is a conditio sine **2/70**

105 *Nygaard,* Skade og ansvar (2007) 335.
106 See *Nygaard,* Skade og ansvar 334.
107 See *Nygaard,* Skade og ansvar 335 with references to other theorists.
108 The principle of »time limitation« in this respect has been thoroughly developed by *M. Kjelland,* Særlig sårbarhet i personskadeerstatningsretten (2008) 283–350.
109 *Stang,* Skade voldt av flere (1918) 48–52.

qua non after all. Secondly, other scholars and court practice later suggested that A may be held liable in spite of the fact that the alleged tortfeasor's conduct does not qualify as a conditio sine qua non. Such an inference may be based upon a notion of »common act«, a concept which builds on ideas of attributing the acts of A to B on the basis of their common goal or respective role in a greater operation with a certain intended outcome[110]. The famous NOKAS case highlights this reasoning: several men committed a burglary in a building that stored large amounts of cash. During the heist a policeman was killed. A person who was acting as a lookout, responsible for the escape cars, was found responsible for the killing of the policeman. He was of course neither a factual nor a psychological causal factor in the crime committed. In a recent doctoral thesis *Hagland* investigates thoroughly what kinds of connection between the alleged tortfeasor and the damage may replace the conventional causal factor requirement of the conditio sine qua non test. She claims that *elements of identification* are involved as well as *causal links* that do not qualify as necessary causes[111]. By elements of identification, the thesis refers to the social-psychological tendency to perceive two legal entities as a unit[112]. *Hagland* combines the various previous theories and provides for a rather convincing theory on the contextual impact of causal links that do not meet the requirements of the conditio sine qua non test[113].

110 See on the concept, *Askeland,* Tapsfordeling (2006) 250 f; cf also *Nygaard,* Skade og ansvar 350.

111 *Hagland,* Erstatningsbetingende medvirkning (2012) 161–206. See especially 199 f and 225 f.

112 See on »den psykologiske identifikasjonstendens« [the psychological tendency to perceive subjects as units, »identified« with one another]; *J. Andenæs,* Identifikasjonsproblemet i erstatningsretten, TfR (1943) 361–401; *Askeland,* Erstatningsrettslig identifikasjon (2002) 60–64.

113 Her ideas are summarised in *Hagland,* Erstatningsbetingende medvirkning 199 f and 225 f.

Part 6 The elements of liability

I. Wrongfulness

A. Introduction

Under Norwegian law, the doctrinal history of wrongfulness has been tied to a conduct based approach[114]. In the early parts of the 20th century scholars believed that one could make a sort of formula for the boundary between lawful and wrongful conduct within tort law and the application of the culpa norm. This assertion initiated a far-reaching Nordic debate on wrongfulness (rettstridslæren)[115]. The controversy ultimately culminated in a common stance that wrongfulness in reality was only a name for the result of a concrete elaboration that may be formulated thus: did the actor in the concrete case act differently than he ought to have done, all things considered? Only reminiscences of the older doctrine were left and held by some scholars[116]. The mentioned elaboration has consumed the question of whether Acts, other written rules or unwritten customs have been violated. Such violation is of course a strong indication of culpability but, however, not necessarily decisive. The conduct based approach has to a large extent solved the problem of distinguishing between wrongfulness and fault, because both concepts nowadays must be seen as angles or potential arguments relevant to a comprehensive criterion of culpa. **2/71**

The above-mentioned debate concerned only tort law, but »rettsstrid« (»wrongfulness«) has also been debated more generally. The question still arises from time to time as a part of the reasoning within private law, but it nowadays merely refers to a situation where rules of conduct are violated. It has thus no important place as a substantial question in legal reasoning. **2/72**

The methodological approach in modern private law is mostly oriented towards asking whether requisites for monetary sanctions are met. This applies, for example, to the law of unjust enrichment. When it comes to questions of a duty to refrain from an action, the question of wrongfulness or unlawfulness plays a more important and material part. The question often turns on whether an activity must be considered to contradict the law. If so, certain remedies are at the victim's disposal. **2/73**

114 Cf the dichotomy between conduct based and result based wrongfulness in Basic Questions I, no 6/15.

115 A survey of the debate is given in *Nygaard,* Skade og ansvar (2007) 173. Salient opponents were *F. Stang, A. Ross* and *W. Lundstedt,* all leading scholars in the respective Scandinavian countries at the time.

116 See eg *V. Hagstrøm,* Culpanormen (1985) 37 f and *Nygaard,* Skade og ansvar 172 f.

2/74 Wrongfulness will, in certain areas of life, define the limits of the concept of damage (see no 2/75 f below). In other areas the question may be whether the alleged tortfeasor has transgressed his or her freedom to act without being hindered by the law (see no 2/77 ff below).

B. Wrongfulness as the delimitation of the concept of damage

2/75 Because of the conduct based approach to wrongfulness mentioned above, it is in general not appropriate to look upon minimum thresholds as something that has to do with wrongfulness. Under Norwegian law the subject must rather be addressed in connection with limiting the concept of damage. To cause negative impacts that do not pass the minimum threshold is, however, not wrongful and does not involve compensable damage. This is actually a de minimis rule, even though commentators and other lawyers seldom speak about the rules in such terms. In neighbour law, a minimum threshold is connected to a principle of reciprocity. A common formulation is to say that every property owner has to endure some level of negative impact from his neighbour without compensation[117].

2/76 De minimis rules are also found in the Acts on product liability and the Act on Patients' Personal Injuries[118]. As for non-pecuniary damage, there are several examples of minimum thresholds, the most predominant being that the impact on amenities must be »significant« (»betydelig«), this means transgress approx 15 % according to the table on »medical disability«. Within Norwegian tort law, a general minimum threshold as such has never been debated. As explained below, the general stance is that the victim should be compensated in full. This also includes claims that amount to small sums of money.

C. Wrongfulness as a delimitation of the freedom to act

2/77 The Norwegian system does acknowledge that some acts, omissions or conditions contradict the body of rules and principles within the legal order, regardless of whether there are sanctions connected to the violation of the rule, and regardless of fault. Hence, if an employer fails to heed a rule on sufficient rest time for his

117 The principle is clearly stated in the preparatory works, see Rådsegn 2 fra Sivillovbokutvalet 18f. Minor nuisance up to a threshold must simply be endured as a part of the neighbourhood relations, in the preparatory works this threshold is called »tålegrense« (»threshold of endurance«).

118 See Produktansvarsloven 23 December 1988 no 104 § 2–3 (3); a threshold of NOK 4,000 (ca € 500), and Pasientskadeloven 15 June 2001 no 53 § 4 first section; a limit of NOK 5,000 (approx € 625).

employees, his act may be wrongful; however, it is not necessarily regarded as a faulty act. The same constellation will occur where a child crosses a road despite a red traffic light. The act is in itself wrongful; however, there is no fault involved since the child lacks the personal ability to commit faulty acts according to the law.

2/78 When it comes to non-pecuniary loss there is no direct link between wrongfulness and sanctions. Negligent behaviour that causes another man pain, for example, running into another person on the street, may not give rise to compensable damage, but still the act is in itself no doubt wrongful[119].

2/79 This way of perceiving wrongfulness will often overlap with the doctrine of liability for culpable acts. The reason for this is that the culpa rule in many areas of life represents the line between rightful and wrongful behaviour according to the requirements of the legal order. The culpa standard is perceived as objective; however, still in the sense that certain distinctions must be made. A person does not act culpably if the reason for his failing to act prudently was illness or lack of intellectual capacity. In the latter case, the question of culpa would be whether the alleged tortfeasor ought to have avoided a situation that he could not handle[120]. Correspondingly, a specially trained tortfeasor must be treated as such. A professional gym teacher must meet the standards for gym teachers and a person who acts as an attorney cannot be excused for mistakes only because he is young and inexperienced[121]. As for young children, they are regarded as lacking the capacity for blameworthiness. According to theory and practice, they gain such capacity only when they reach the age of seven; hence, the Norwegian system at this point is quite similar to German law.

2/80 As for omissions, the Norwegian doctrine has for a long time considered this to be a question of the legal basis for liability. Firstly, the Norwegian doctrine has tried to even out the differences between tortious omissions and active tortious acts by emphasising that in both categories blameworthiness is based on the fact that the alleged tortfeasor should have performed an alternative act – he or she should have done *something different.* Secondly, the doctrine revolves around various types of »tilknytning«; which means the »connection to« the risk that resulted in damage. If the tortfeasor had some kind of qualified connection to the risk, he should have reacted by doing something other than he did. The »Ingerenzprinzip« (duty of someone who creates a dangerous situation to undertake something to avert the danger) fits into this formula. The one who actively creates a risk has sufficient connection to the risk and therefore the motivation to prevent it[122].

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119 Compensation for pain and suffering is only granted provided that the tortfeasor has shown gross negligence or intent, see skl. § 3–5. Thus, victims suffering pain caused by only simple culpa or an activity falling under strict liability do not have any claim for compensation.

120 *Nygaard,* Skade og ansvar 212 f.

121 See respectively the cases Rt. 1997, 1011 and Rt. 1994, 1465.

122 *Nygaard,* Skade og ansvar 184.

2/81 Sometimes a connection to the victim creates the connection to the risk[123]. Thus, the Germanic tendency to assign weight to the kind of relationship there is between the tortfeasor and the victim has a counterpart under Norwegian law: whether or not the alleged tortfeasor had a duty to act depends on his relationship and, more precisely put, his connection to the victim. This connection may be based upon family, a contract or special duties of a job or position. If there is a family connection, the duties to act may increase, typically for the parents in their duties of care towards their children. Such an increased duty is supported and expressed by the legal order in the Acts regarding family law.

2/82 Other connections may be based on simple everyday agreement (a neighbour looking after the flowers during a holiday) or even looser and more temporary connections may exist. The connection must, however, have a minimum of strength and continuity to qualify. The doctrine takes the stance that there has to be some kind of connection to the victim that renders the tortfeasor liable *as opposed to other people.* Hence the pit example[124] has a Nordic equivalent in an example of a drowning man. A mere bystander has no duty to help and he cannot be held responsible for his omission to do so. The doctrine thus leads to the conclusion that there is no liability in the pit-hole example. There is, however, one small difference between the pit situation and the drowning situation: of course it is much easier for the man passing by to alert the blind man of the pit than it is for the bystander to dive into the water in order to save the drowning man. This fact, paired with modern normative, altruistic attitudes may serve as arguments for liability in spite of the classic stance regarding the drowning man. It is, however, very doubtful that the courts actually would deem the bypasser liable. Court practice and theory suggests that the bypasser would be acquitted[125].

2/83 Norwegian law does not recognise any kind of lenient culpa standard within family relations. The culpa standard is perceived to be relative and to some extend tailored to the special relations the case concerns. However, any kind of leverage on the part of the tortfeasor based on his family relation to the victim would probably contradict the prevailing values of Norwegian law. If the family relation has any impact on the culpa standard at all, it would probably go the other way. Parents may be subject to a special duty of care because of their children's supposedly weak position and corresponding need for protection by the legal order.

2/84 Dangerousness may generate wrongfulness within the application of the *Learned-Hand formula,* but it may also constitute wrongfulness in itself, cf the doc-

123 *Nygaard,* Skade og ansvar 187.

124 See Basic Questions I, no 6/46.

125 See the case RG 1984, 338; a woman discovered a key in her neighbour's post-box. She took it out, and then put it back. She was not found liable for a later theft from her neighbour's apartment when a thief used the keys to get inside: *Nygaard,* Skade og ansvar 185f.

trine of strict liability for dangerous activities (see no 2/101 ff below). There are also many statutory provisions that establish strict liability for certain kinds of damage related to dangerous things, see, for example, the Act on Funfairs, the Act on Nuclear Activity, and the Act on Railways[126]. The liability clauses in these Acts are based solely on dangerousness. The activity in itself is of course not wrongful, but once damage is caused the owner or other legal subject involved is liable.

Sometimes the elements of wrongfulness that are connected to conduct, and the elements that are connected to damage, are perceived as a continuum. This means that the act in itself, the mode of an operation in itself, is decisive and has a certain negative effect sufficient for the concept of relevant damage within the law of torts. This will be the case for illegal ways of competing on a market. To gain profit at the expense of a competing business is not wrongful in itself, and the loss of market shares will not per se be damage relevant to tort law[127]. However, if the profit is obtained by unlawful means, by acts that distort competition or in other ways contradict the rules of fair business activity, the competitor who has suffered a loss because of the acts may claim damages from the perpetrator[128]. **2/85**

A crude outline of the Norwegian perception of wrongfulness may be that it mostly refers to conduct, but may also refer to the concept of damage. **2/86**

II. Misconduct in the sphere of the responsible party

A. Introduction

As under Austrian law, there is a whole cluster of rules stating that a principal should be responsible for the tortious acts committed by auxiliaries. There are two main rules on the subject. Firstly skl. § 2-1 reads that an employer, regardless of his own conduct, is liable whenever his employee causes damage in a culpable way within the scope of his employment. The strict liability rule for the principal is justified by the fact that the employer and the employee have a close and lasting relationship with the purpose of supporting the interests of the principal. Hence, the rule only applies where there is a work relation in the eyes of the law, for which there are certain guidelines in the preparatory works. For example, the degree of instructive competence on the part of the employer, the element of agreement on wages by the hour, the question of whose equipment is used etc, will be relevant **2/87**

126 See Tivoliloven 7 June 1991 no 24 § 7; Atomenergiloven 12 May 1972 no 28, chapter 3; Jernbaneansvarsloven 10 June 1977 no 73 §§ 9 and 10.

127 See the point made in *Hagstrøm,* Culpanormen 56.

128 This is maintained as a general and undisputed principle within Norwegian law, see *T. Lunde,* God forretningsskikk (2000) 36 f.

factors when deciding if there is a work relation qualifying for § 2–1. In general, it is decisive whether the contract is aimed at producing a certain result or procuring a service over a period of time. The latter alternative is a crucial feature of a work relation within § 2–1[129]. Very short, unpaid services, for instance by a neighbour buying bread, are not regarded as qualified.

2/88 Secondly, a general principle states that a contracting party may be vicariously liable for people or entities he chooses to assist him in the activity of performing the contractual obligations[130]. The justification of this rule is very much tied to the obligation and the other party's expectations and need for foreseeability[131].

2/89 Conversely, the principal who engages a person or entity to perform some task as an independent contractor (ie not as a servant), is not liable for any conduct of the independent contractor, provided that the task is not a part of a contractual obligation. Hence, in order to avoid liability for damage caused by his auxiliary, it may be vital for the principal to prove that the harm was caused outside the scope of employment or outside the scope of fulfilling a contractual obligation.

B. The rule of respondeat superior; skl. § 2–1

2/90 With regard to skl. § 2–1, a justifying ground for strict liability on the part of the employer is the very fact that the employer employed the direct tortfeasor in order to have him pursue his interests (including profit). In addition, another significant reason for the rule is the fact that it would be very difficult for the victim to provide evidence that the employer was culpable in his selection or supervision of the employee. Thus, strict liability serves both as a sort of presumption rule and a rule with preventive aims. As long as the employer knows that he will be liable for any tortious conduct by his employee, he has the incentive to pick the right people for the right tasks and to instruct them properly. The employer also has an incentive to supervise and control[132].

2/91 As long as a significant reason for liability without fault is that the direct tortfeasor is actually employed by the principal on a regular basis, the distinction between employees and independent contractors must be drawn carefully and distinctively. These limits of the scope of employment are to a large extent decided by the character of the working position and the question of whether the activity in which the faulty behaviour occurred was performed in the interest of the em-

129 Further on these guidelines, see *Nygaard,* Skade og ansvar 224–227. See also the preparatory works of skl. Innstilling II (1964) 27 f.

130 This is the equivalent of »Erfüllungsgehilfe« under German law; cf § 278 BGB.

131 See *Askeland,* Erstatningsrettslig identifikasjon (2002) 182.

132 On the legislative purposes of skl. § 2–1, see eg *Nygaard,* Skade og ansvar 220 f.

ployer. The reasoning in such cases turns very much on whether there is sufficient connection between the professional function and the harm done. One may therefore look upon the discussions of scope of liability as a sort of adequacy topic. The topic differs from ordinary questions of adequacy because the connection under scrutiny is between the function of the professional position and the actual damage that took place[133].

2/92 Special attention is given to cases where an employee acts solely to pursue his own interests and goals, typically by stealing from or deceiving the people or businesses that the employer has contractual relationships with. In the preparatory works of the mentioned rules, it is emphasised that the fact that the employee acted with intent in general will speak against liability for the employer. Still, there are several cases where the principal has been held responsible after all. The explanations for these cases are often that the danger of deliberate criminal acts is inherent in the business performed. For example, in the decision referred to in Rt. 2000, 211 a bank manager committed fraud by misusing his title and position, so that another bank suffered a loss of approx NOK 17 million (approx € 2 million). The fact that bank activity involves people having access to large sums of money makes it probable that the opportunities within the various professional positions are sometimes misused. This is regarded as a sort of calculated risk for the owner of the bank, and he must therefore be prepared to pay when a criminal activity occurs. If the criminal activity is too vaguely connected with the professional position of the employee, the principal will not be liable after all; see, for example, Rt. 1996, 687, where a caretaker in a building at night stole goods from an adjacent building to which he had access as a part of his professional position. In a very recent case, the Supreme Court highlighted a new issue, namely whether or not the victim should have been more careful; see Rt. 2012, 1765: an employee at a rental car service sold one of the rental cars for approximately half of the market value of the car. The fact that the buyer should have understood that it was a fraud was a decisive factor for acquitting the rental car company.

2/93 These cases often fulfil the criteria for contract-based liability, because the victim is typically affected in connection with the principal performing a contractual obligation with the help of his employees. The fact that there is a contractual obligation involved may be a strong argument for liability even where the employee acts in a very unpredictable and criminal way (see further on this in connection with »Erfüllungsgehilfe« below). However, this argument often seems overlooked because the Supreme Court focuses on the positive criteria of adequacy in the rule on employers' liability, skl. § 2-1. The problematic aspects of this approach came to the fore in a case where a security guard set fire to the very building he was sup-

133 For an elaboration of the adequacy theme of employers' liability, see *Askeland,* Erstatningsrettslig identifikasjon 109–113.

posed to be looking after. Seen from the narrow angle of the employer's liability, one could argue that the misdeed fell outside what could reasonably be expected or what might be considered adequate in any way. Hence, the employer should be acquitted. On the other hand, the contractual approach strongly speaks against such a solution. The company which had entered into a contract to supervise the buildings had done so in order to avoid fire. When the security company, as a part of its performing of the contract, brought a pyromaniac into the picture, this was a clear breach of the contract, and something that it should be liable for[134].

C. Vicarious liability in contract

2/94 Under Norwegian law, the other main rule is that a principal is liable without fault whenever an auxiliary wrongfully causes damage to a contracting party in connection with his performance of a contractual duty. The justification for this liability rule is simply that the contract must be fulfilled and for preventive reasons the contracting party must be liable for any error made or fault committed by his helpers and personnel within his sphere.

2/95 The scope of the contract therefore often draws the boundaries of liability. The typical question would be whether some kind of negative effect on the part of the contract party may constitute a breach of contract. If so, the question is whether there is fault on the part of anyone in the principal's sphere. If this question is answered in the affirmative, the principal will be liable.

2/96 Of course there are limits to this approach, typically where objects other than the objects central for the contractual performance are involved. As for the typical example of damage to things in the flat of a purchaser who ordered something (Basic Questions I, no 6/108), the question of whether the principal is liable is quite open. Theorists have suggested that a first criterion would be whether the contract was a conditio sine qua non for the damage caused. This criterion may, however, not be precise enough and therefore leave too much responsibility with the principal. A suggestion has therefore been to accord weight to whether the damage occurred as a consequence of performing an element that is essential to the contract, which would involve liability, whereas a mishap during an activity in order to fulfil the more peripheral obligations of the contract would not involve liability[135]. One scholar has tried to develop this thought further, by proposing a theory that asks the question of whether the damaged good was deliberately exposed

134 See on the subject *K. Krüger,* Pyroman i vekterklær, TfE (2010) 5–28 and *M. Strandberg,* Arbeidsgivers erstatningsansvar for skader hans arbeidstaker volder med forsett, Jussens venner (2012) 33–68.

135 *E. Selvig,* Husbondansvar (1968) 112; *P. Augdahl,* Alminnelig obligasjonsrett[5] (1978) 226.

to the risk or not[136]. The Dutch idea of asking whether the contract increased the risk has not been aired in the Nordic doctrine. It may, however, be noted that this solution is very consistent with reasoning in other fields such as concerning adequacy questions in general[137] and the special adequacy test of employers' liability described above[138].

Another twist to the problem is added when the auxiliary acts intentionally. **2/97**
The pyromania case cited above highlights many of the crucial questions on this point. The task of looking after the building put the pyromaniac in a position to do his misdeed. The case therefore highlights the points made in Basic Questions I, no 6/110: »the auxiliary gains the opportunity precisely by being entrusted …«. This argument may in itself be sufficient to render the principal liable, but I would guess that the contract being a mere condition for intentional, criminal acts may not suffice. It would for instance be too harsh upon a contracting party if this was the case when his »Erfüllungsgehilfe« (an attorney, a plumber, a carpenter) made an unprovoked physical attack on the other contracting party because he realised that he coincidentally was an old enemy from primary school[139]. The question must in my opinion turn upon the proximity between the intentional damage and the performance of the contract that the contracting party has paid for. Thus the pyromania case is instructive: the intentional act damaged the very object that the pyromaniac was supposed to be looking after. The correspondence between the purpose of the contract and the intentional act of the auxiliary may in my opinion be a decisive criterion for liability[140]. Such a criterion would correspond with the Austrian reasoning connected to the main performance duty[141].

D. Liability for family members

A special rule on liability based on family relations is skl. § 1–2. This provision is **2/98**
relevant because it illustrates how family relations are dealt with when construct-

136 *Askeland,* Erstatningsrettslig identifikasjon 218–239.
137 See on the criterion of »påregnelighet« *Nygaard,* Skade og ansvar 354 f.
138 See above in no 2/92, furthermore the cases Rt. 2000, 211 and Rt. 1997, 786.
139 *Peter Cane* has pointed out that the contract must be relevant to the damaging incident, see *idem,* Tort Law and Economic Interest (1996) 308. Norwegian tort law is compatible with the Germanic stance that the contract providing the auxiliary with the mere opportunity for doing damage is not enough, see for instance *S. Mennemeyer,* Haftung des Schuldners für Gelegenheitsdelikte seiner Erfüllungsgehilfen (1983) 109.
140 There are strong indications that a decisive question is whether or not the damage is done to the object of the contract or not, see a special elaboration on this in *Askeland,* Erstatningsrettslig identifikasjon 222 ff. See also *K. Lilleholt,* Tingskade og kontrakt, in: G. Holgersen/K. Krüger/K. Lilleholt (eds), Nybrott og odling, Festskrift til Nils Nygaard (2002).
141 Basic Questions I, no 6/111.

ing liability rules within Norwegian law. The parents are liable regardless of fault for acts committed by their children that are deemed to be culpable – including negligent acts. Such acts are implicitly regarded as wrongful, however, it is the culpa rule in itself that is referred to in the wording of the mentioned provision. There is, however, a cap on the responsibility, as low as NOK 10,000 (€ 1,200). The rationale behind the rule is prevention and the need for the victim to have the damage compensated. Furthermore, reference is made to »the general perception of justice« that parents out of decency would want to pay for the damage done by their children[142]. It may be fair to add that the general tendency to identify children with parents and vice versa has also played a part. Under Norwegian law, several rules of identification are justified by referring to a »psychological tendency to identify subjects with one another«[143].

E. Liability for organs

2/99 The above-mentioned bases of liability include different variations of identification between a principal and an auxiliary who acts more or less on behalf of the principal. A sort of identification is also needed where a physical person acts on behalf of a legal entity, cf what in German law is called »Organhaftung«. Under Norwegian law, the same institute is established, partly inspired by German law[144]. The idea that certain physical persons represent the legal entity or – so to speak – literally *are* the legal entity has not been expressed in any Act, rather it is an uncodified general rule of the kind mentioned in no 2/1 ff above. This construction has limited practical significance because victims in most cases will be better off suing on the basis of respondeat superior, skl. § 2–1. There are, however, certain rules where liability requires that the responsible subject in person has committed the tortious act. This is the case for non-pecuniary compensation for pain and suffering (cf skl. § 3–5). As mentioned above, this rule has a requisite of intent or gross negligence. In some cases the victim has to prove that the persons, being the organ of a legal entity (a company), have acted with gross negligence. Another area is within contract law, where sometimes the contract comprises a waiver stating that the contracting party is not liable for damage caused by grossly negligent conduct of his employees. The predominant opinion is that a contracting party, however, cannot validly present a waiver exempting him from the responsibility for his own grossly negligent con-

142 See Innstilling I (1958) 17 f.

143 See *Andenæs,* TfR (1943) 361–401, 482 and *Askeland,* Erstatningsrettslig identifikasjon 60–66.

144 The preparatory works of skl. refer to German law and the »organtheory« of *O. von Gierke,* Die Genossenschaftstheorie und die deutsche Rechtsprechung (1875); see Innstilling II fra komiteen til å utrede spørsmålet om barn og foreldres og arbeidsgiveres erstatningsansvar 1964.

duct. Therefore, the other party in the contract may try to prove that the damage was caused by an organ for the contracting company[145]. An example is the case in Rt. 1994, 426: a cargo controller decided that heavy rolls of papers should be stored in a special manner in the cargo hold before being shipped to a destination across the Atlantic. The storage was negligent and the rolls fell and were damaged during the journey overseas. The shipping company succeeded in being released from liability on the basis of a waiver for the grossly negligent acts of employees. The court found, however, that the cargo inspector could not be looked upon as an organ of the company, hence the company was acquitted. The case shows that the question of which physical persons are in positions that allow attribution of liability to the company to some extent must be discussed on the concrete merits of the case.

2/100 The question of which persons have to be considered as organs, however, has traditionally been answered by pointing to the highest levels of the company hierarchy. Hence, the board and the chief executive may render the company liable. Also directors and managers on a lower level may be considered to be organs, provided that they are the head of a division that is the origin of the damaging act. An interesting question is whether an accumulation of minor mistakes or minor negligence by persons on a sufficiently high level in the company may amount to gross negligence, rendering the company liable. This question was answered in the affirmative in a case from the district appeal court, RG 1995, 1298. The court found that as many as seven persons on the top level of a company had cumulatively caused the death of a truck driver. His widow was awarded compensation for bereavement, something that requires gross negligence by the responsible party in person. In my opinion, the idea of cumulative gross negligence contradicts the idea of an organ of the company. Moreover, as long as the board of a company together may commit a tortious act as an organ of the company, there is no reason to establish liability based on the cumulative acts of another set of persons at the top level of the company.

F. Dangerousness

2/101 Dangerousness may constitute a basis for liability under Norwegian law. Back in the 19th century the rule was that compensation only followed fault. As men invented various production machines in the Industrial Revolution, it became clear that accidents might happen even if nobody were to blame for anything. The mere owning of an industrial plant could lead to damage, and there was of course a need for compensation when workers were injured during working hours. The so-

145 See particularly *V. Hagstrøm,* Om grensene for ansvarsfraskrivelse, særlig i næringsforhold, TfR (1996) 421–518.

lution was to interpret the culpa rule in a very strict manner[146]. This was a product of a certain kind of reasoning: the more dangerous the activity is, the more the situation calls upon the owner or actor to take care. Hence, the dangerousness affects the duty of care. The duty of the owner became very strong, so strong that it was a short step to the category of strict liability.

2/102 In 1897 a scholar stated that a rule of strict liability for »farlig bedrift« (»dangerous enterprise«) was a part of Norwegian law[147]. In the subsequent decades the Supreme Court passed several decisions consolidating a general rule on strict liability[148]. Certain criteria were developed: the damage had to be a result of a »continuous, typical and extraordinary risk«. These criteria are not precisely defined; they may be looked upon as variables[149]. Hence, if the damage is caused by a very typical risk of the enterprise or thing, the risk may not have to be correspondingly typical or extraordinary to the victim and vice versa.

2/103 Independent of the stance concerning the character of the criteria, the courts have also taken into consideration other issues. It is quite well accepted that the overarching question is to decide »who is the closest to carry the risk«, a question that invites a varied set of considerations. Among these is the idea that the person who profits should bear the consequences (»cuius commodum periculum est«), the question of whether or not it was convenient for the allegedly responsible party to take out insurance, analogies from expropriation rules, whether there was a technical defect and lastly considerations of what is reasonable on the concrete merits of the case. An interesting observation is that the Norwegian solution concerning dangerous activity eliminates the problems highlighted in Basic Questions' account of European law on the subject[150]. Under the Norwegian, quite vague, rule there is no danger of being left with gaps that may not be addressed by judges. As long as there is considerable leeway for assigning weight to what is reasonable, and as long as the list of relevant arguments for practical purposes is open ended, there will always be possibilities for the informed judge to produce a tailored decision that really highlights the concrete merits of the case. Norwegian law may at this point be described as a sort of »topic method«[151]: a set of crudely formulated arguments are available to the judge. Within very wide boundaries judges are called upon to pass the best judgment all things considered – to interpret the previous cases on strict liability so that the law can be seen in its best light.

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146 See eg the cases referred in Rt. 1866, 735 and Rt. 1874, 175.

147 *N. Gjelsvik,* Om skadeserstatning for retmæssige Handlinger efter norsk Ret (1897). See a survey of the further development in *Nygaard,* Skade og ansvar 253 f.

148 The first one in Rt. 1905, 715; followed by Rt. 1909, 851; Rt. 1916, 9 and Rt. 1931, 262.

149 In fact, whether the criteria are cumulatively necessary requisites or merely guidelines has been a debate among leading scholars for a long time.

150 Basic Questions I, no 6/146.

151 Cf *T. Viehweg,* Topik und Jurisprudenz (1974).

The method fits very well with the pragmatic approach that is dominant in many aspects of Norwegian private law[152]. There is very often argumentative room for a sound decision that is well-fitted to the concrete merits of the case. One should note that the development in this field of law is in accordance with the lawmaker's attitude. In many preparatory works of statutory law, the lawmaker makes a conscious choice to delegate the development of the law to the courts. **2/104**

The uncodified general rule of strict liability has functioned remarkably well, and many cases have found their just and fair solution through open and specially tailored arguments of the kind described above[153]. Still, the weakness of the approach is obvious: there is a lack of foreseeability in this field of law, something that invites litigation and complicates calculation tasks for the insurance industry. **2/105**

In my opinion, the most disturbing feature of the rule is that it invites a sort of analogous thinking that only works one way: if there is a Supreme Court case stating liability for a certain typical continuous risk, it is always possible to argue that a similar risk should qualify. As long as the issue is who should carry the risk and what is reasonable in the concrete case, it is only human that the judge may feel sorry for the victim in an individual case. One may fear that the continuous series of precedents may lead to an ever increasing area of liability. The Supreme Court has, however, in some important cases shown impressive integrity and understanding of its role as *the factual lawmaker* in this field of law. The Court, for example, turned down a smoker who claimed compensation for his suffering from cancer and claims from pioneer divers who many years after their risky dives suffered from subsequent illness[154]. **2/106**

III. An interplay of legal bases

Norwegian tort law to a certain degree recognises an interplay of liability criteria. The most important example is liability based on »strict liability for a culpable arrangement« (»objektivt ansvar for uforsvarlig ordning«), a legal basis that will be explained below. As already mentioned, under Norwegian law courts have considerable room for discretion and development of tort law. Because of this, individual cases may be solved in ways that break new ground in terms of resting on an interplay between normative figures. For example, the burden of proof lies at the **2/107**

152 See no 2/12 ff above.

153 See a string of cases such as Rt. 1905, 716; Rt. 1909, 851; Rt. 1916, 9 and Rt. 1917, 202.

154 See Rt. 2003, 1546 (referred to in *B. Askeland,* Norway, in: H. Koziol/B.C. Steininger (eds), European Tort Law 2004 (2005) 451–461, 453 f) and Rt. 2009, 1237 (referred to in *B. Askeland,* Norway, in: H. Koziol/B.C. Steininger (eds), European Tort Law 2009 (2010) 461–474, 467–469).

outset on the claimant, but is however sometimes shifted to the tortfeasor in order to reach a sound result[155]. There are also several examples of compulsory insurance systems paired with strict liability[156]. These statutory Acts are motivated by the combination of recognised danger and recognised need to distribute the loss.

2/108 Norwegian courts have historically developed an uncodified rule of strict liability that in most cases is seen as a clear alternative to culpability; see the outline of the strict liability for dangerous enterprises above (no 2/101 ff). In some special cases, however, the courts *combine* the reasoning that accords weight to the danger and the allocation of risk with more traditional arguments of culpability. The profound common feature of these cases is that there is a certain dangerous object or arrangement which in itself will not pass the test of »continuous, typical and extraordinary risk«. It may be a hatch in the second floor of a restaurant (Rt. 1991, 1303) or a hot oven in a prison cell (Rt. 1970, 1152) or breakable windows on the second floor of a mental institution making it possible for a patient to commit suicide (Rt. 2000, 388). These arrangements may not be permanent (continuous) enough or dangerous enough (extraordinary enough) to constitute liability in themselves. However, in combination with the fact that the risk could have been avoided if only very simple measures had been taken, the courts are willing to hold the alleged tortfeasor liable. The hatch in the restaurant floor might easily have been secured by proper locking and the breakable windows on the second floor could have been replaced by unbreakable windows at reasonable costs

2/109 The Supreme Court does not explicitly proclaim that there is a certain category of liability in between culpa and strict liability. Judges merely apply the arguments in a concrete manner closely tied to the merits of the individual case. One scholar has named the category »strict liability for negligent arrangements«[157]. The categorisation and the recognition of certain types of cases have made it easier for judges to work with an interplay of misconduct and dangerousness.

2/110 One may note that the fact that strict liability has developed via a very strict application of the culpa norm makes it logical and rationally convincing that there is a middle category that blends the two bases of liability. If the courts have found reasons for strict liability in certain cases, surely there are reasons for a combination of strict liability and culpability.

2/111 Even though the courts are willing to mix bases of liability, there has so far not been any trace of enterprise liability within Norwegian law. Because of the affinity with reasonableness and flexible criteria and the tendency to combine legal bases

155 See Rt. 1960, 1201 and Rt. 1972, 1350. See also *Nygaard,* Skade og ansvar 341 f.

156 See eg Bilansvarslova 3 February 1961 (motor vehicle insurance) and Yrkesskadeforsikringsloven 16 June 1989 no 65 (workmen's compensation).

157 *Nygaard,* Skade og ansvar 275–279.

of liability, the possibility of liability on such grounds cannot be eliminated[158]. Product liability was instigated by Parliament, see the Product Liability Act of 1988, which is designed to comply with the EU directive on product liability of 1985 (even though Norway at the time was not obliged to do so). Thus, the Act on Product Liability was enacted a long time before Norway committed to the EEA Agreement in 1992. The solutions in the directive were not really consistent with developments regarding product liability principles at the time which were based on court practice. The liability rule for products was the general culpa rule[159]. On the other hand, there have been cases based on strict liability that have been harder on the tortfeasor than what follows from the directive[160]. There has been a debate on whether the cases based on strict liability in fact contradict the directive to the extent that this directive has been perceived as totally harmonising the field of law within the European Union and EEA[161].

When it comes to defects in things, the existence of such may play a role according to various legal bases. A technical defect may in itself be a reason for establishing strict liability under the uncodified rule. In fact, it has been maintained in the doctrine that the existence of a technical defect reduces the required level of typical and continuous risk[162]. The fact that the damage was caused by a defect is also an argument for strict liability via an emphasis on preventive effects: the risk of damage of this kind should be placed with the party who is able to avoid damage by proper maintenance[163]. **2/112**

IV. Contributory responsibility of the victim

In Norway, the question of contributory responsibility of the victim is regulated by a certain provision in the Compensation for Damages Act § 5–1. Scholars have highlighted the notion that this is really a rule on responsibility of the victim[164]. Thus, in older literature it was emphasised that contributing to damage to yourself was not a wrongful act[165]. Because of this, one had to establish fault or another recognised legal basis for liability on the part of the victim. **2/113**

158 See *B. Askeland,* Principles of European tort law og norsk erstatningsrett, in: T. Frantzen/J. Giertsen/G. Cordero Moss (eds), Rett og toleranse, Festskrift til Helge Johan Thue (2007) 24–37, 31 f.
159 See *Nygaard,* Skade og ansvar 467 with reference to cases such as Rt. 1973, 1153.
160 Rt. 1992, 64 and Rt. 1993, 1201.
161 See a survey of the debate with references in *Nygaard,* Skade og ansvar 456.
162 *Nygaard,* Skade og ansvar 273.
163 See the reasoning in Rt. 1972,109 and the elaboration of the preventive purpose of the rule in *Nygaard,* Skade og ansvar 259.
164 *Stang,* Skade voldt av flere (1918) 167 and 218–223; *Nygaard,* Skade og ansvar 386 f.
165 *Stang,* Skade voldt av flere 166 f.

2/114 Scholars have pointed out certain differences between culpa of the *tortfeasor* and culpa of the *victim.* An important one is that the purpose of reparation of the damage sometimes induces a judge to conclude that the alleged tortfeasor was culpable, whereas the purpose of reparation does not have the same strength when it comes to the damage the victim has caused to himself (by contributing to the damaging act)[166]. Furthermore, *Nygaard* holds that the demands society imposes upon the victim to take action to avoid damage is relatively modest compared to the demands upon the tortfeasor[167]. The reduction may also be justified when it can be proved that the damage was partly caused by a dangerous thing or event in the victim's sphere[168]. This may be looked upon as an adverse version of strict liability.

2/115 The rule also states that the victim or some entity within his sphere must have been a *cause* of the damage. Once contribution to the damage by an act or condition that satisfies the requirements of liability (fault or strict liability) is proved, the judge may reduce the award accordingly. The wording suggests a discretionary decision by the judge; however, court practice seems to be that a reduction will occur once the above-mentioned elements in the guidelines are present in the case at hand[169].

2/116 Hence, the rule states that, where a victim has contributed to the damage in a culpable manner, the claim should be reduced in proportion to the degree or quality of the causal contribution and the degree of fault. The provision also allows »other circumstances« (»forholdene ellers«) to be taken into consideration. At least formally, the judge is left with discretion as to whether the claim should be reduced at all.

2/117 The concrete discretion prescribed in the rule seems to have eliminated any attempts at establishing theories such as the equal treatment theory, even though elements of such a theory were put forward at the beginning of the 20th century[170]. The questions are solved as matters of interpreting the statutory provision. It is also pointed out that the purpose of reparation of the damage does not put pressure on the victim in the same way as it does on the potential tortfeasors[171]. Apart from this, there are no traces of general theories of differentiation at play.

166 *Nygaard,* Skade og ansvar 315.
167 *Nygaard,* Skade og ansvar 388.
168 See the wording »eller forhold«, skl. § 5–1 no 3.
169 Cf *P. Lødrup,* Lærebok i erstatningsrett (2009) 417.
170 *Stang,* Erstatningsansvar (1927) 156.
171 *Nygaard,* Skade og ansvar 315.

One should, however, note that the statutory provision allows weight to be accorded to the fact that the tortfeasor has the possibility of insurance[172]. The possibility of insurance on the victim's side is not mentioned, and court practice has accordingly been careful in referring to this point. The important principle of providing full compensation and consequently not reducing damages any more than there are sufficient reasons to do so, may play a part at this point. It may also be noted that the preparatory works mention that one is allowed to take into consideration the *social needs* of the victim, either addressing this aspect under the wording »the extent of damage« or »other circumstances«. In court practice this has led to modest reductions of damages in personal injury cases, especially where the victims are young. When applying the law thus, the court attaches weight to both the poor financial situation of the victim and its young age[173]. The relatively »kind climate« of Norwegian courts encourages judges to refrain from denying full compensation to young people who have had their lives ruined by an accident. Such practice is most evident within motor vehicle insurance cases. It seems, however, to be a common understanding between tort lawyers that this kind of reasoning may also occur when applying the general rule of reduction (skl. § 5–1)[174]. At such points there really are differences between how the tortfeasor and the victim are treated corresponding to their degree of fault and contribution to the damage[175]. **2/118**

V. Reduction on the basis of auxiliaries' conduct

The concept of »identification« refers to the mechanism of letting A pay for something B has done, either being held liable (typically employers' liability) or having one's claim reduced because of a connection to another who contributed to the tortious act (imputed contributory neglect). The concept of identification is useful when comparing the mechanism on the side of the tortfeasor with the corresponding mechanism on the victim's side. **2/119**

Under Norwegian and Nordic doctrine, the equal treatment thesis is a sort of theoretical guideline for questions concerning imputed contributory neglect, but is, however, not decisive in any way. The equal treatment thesis suggests that iden- **2/120**

172 See »forholdene ellers«, skl. § 5–1 (1) and the preparatory works, see NOU 1977: 33 Om endringer i skadeserstatningsloven 38.

173 See eg Rt. 2005, 1737, where the court pointed to the fact that the victim had her life »ruined« by the accident.

174 See eg *Nygaard,* Skade og ansvar 392 f.

175 The difference was recently especially highlighted in an article, see *B. Askeland,* Rettferdighetsideer i personskadeerstatningsretten, in: A. Syse/K. Lilleholt/F. Zimmer (eds), Festskrift to Asbjørn Kjønstad (2013) 17–34.

tification works in the same way on the tortfeasor's and the victim's side. Some scholars previously advocated such a doctrine, but the Nordic version seems to be that one must stretch the »identification« on the claimant's side at least as far as one does on the tortfeasors side[176].

2/121 At the same time, the question of imputed contributory negligence must be solved by a scrutiny of the concrete merits of the case, and the specific relevant arguments. This is an approach that also leaves the judge room for both creativity and discretion.

2/122 Hence, the question of whether the principal's award should be reduced is left quite open in the Act on Compensation for Damage § 5–1 (3). The wording of the text reads that a judge may reduce an award due to the auxiliary's negligent contribution to the damaging event. In the preparatory works of the Act, reference is made to the rules on identification developed in court practice and theory. According to doctrine, the identification on the part of the claimant's side should be at least as far-reaching as the identification in cases where the principal is the responsible party, typically employers' liability (respondeat superior). Theorists have advocated that the notion of a more far-reaching effect of identification on the claimant's side can be justified by looking to the fact that the principal trusted the auxiliary with his goods, person or assets[177]. By doing so, he made a deliberate choice to involve the auxiliary at the risk of losing the value of the good entrusted[178]. The consequences of the entrustment are foreseeable. Conversely, when a principal chooses an auxiliary for an activity in his interest, the damage and the correspondingly financial responsibility for the principal may potentially be very high, almost limitless. There is no fixed upper limit as in the situation where the principal is the claimant and may have his award reduced due to the auxiliary's negligence[179]. This speaks against a wide identification in a way that is not relevant to the victim and his auxiliaries.

2/123 The liability for the negligent acts of another is somewhat broader in Norway than seems to be the case in Germany and Austria. An employee is held strictly liable for the damage he causes when acting negligently within the scope of employment. Liability by identification is established regardless of whether there is any contract or special relationship between the principal and the victim. Corre-

176 See *Stang,* Skade voldt av flere 295 ff; *Askeland,* Erstatningsrettslig identifikasjon 309 with references.

177 *V. Hagstrøm,* Læren om yrkesrisiko og passiv identifikasjon i lys av nyere lovgivning, in: T. Falkanger (ed), Lov, dom og bok, Festskrift til Sjur Brækhus (1988) 191–202, 200.

178 *Askeland,* Erstatingsrettslig identifikasjon 310 f and 321 f.

179 This point is especially emphasised in Swedish doctrinal literature, see *A. Adlercreutz,* Några synspunkter på s.k. passiv identifikation i skadeståndsrätten, in: F. Lejman et al (eds), Festskrift til Karl Olivecrona (1966) 32. See also on the reasoning within context, *Askeland,* Erstatningsrettslig identifikasjon 311 f.

spondingly, there is considerable room for reduction on the basis of imputed contributory negligence. Such identification is uncontroversial in cases concerning damage to things or pure economic loss[180].

In personal injury cases, however, the room for identification is much narrower. There is a long tradition of *not reducing* personal injury awards on the basis of contributory negligence[181]. The same goes for the question of reducing the award to dependents because of the breadwinner's negligent contribution to his own death. The reason for this is social considerations[182]: the lawmaker wants to ensure that the plaintiffs are left with sufficient compensation to have a decent standard of living. Of course the social security benefits will secure the basic needs of children and supported spouses, but the idea is to make the tortfeasor pay on top of the benefits so that the next of kin are provided for as far as possible in spite of their relative's contribution to the damage. In the preparatory works it is even emphasised that the main rule should be *no identification* between the dependents and the deceased breadwinner[183]. As for damage to things, the tendency towards the identification solution is stronger. One may say that the main rule is the opposite: the negligent conduct of an auxiliary as a general rule motivates reduction of the claim. For this kind of damage, the Norwegian stance seems to be similar to the Germanic approach: identification as far as the auxiliary has contributed to the damage. **2/124**

An interesting point in the outline above is that social considerations seem to play a significant part in the application of rules on reduction of damages. Such considerations speak against identification that results in a reduction of damages. The underlying value is consistent with the values constituting the special system of loss coverage associated with »the Nordic model«. The orientation is very much influenced by ideas of distributive justice. In various contexts a quite pragmatic approach is taken: if a type of damage is typically covered by insurance, there is a clear willingness to refrain from reduction.[184] This attitude is not only a feature of Norwegian tort law, but also Swedish law. In fact, Swedish law is even more reluctant than Norwegian law to reduce damages, something that has been highlighted in the Norwegian debate on the subject[185]. **2/125**

180 See on this *Askeland,* Erstatningsrettslig identifikasjon 305–394.

181 See *Andenæs,* TfR (1943) 361 ff; *Askeland,* Erstatningsrettslig identifikasjon 394–396, 414–416.

182 The same policy argument that was mentioned above comes to the fore also in this constellation.

183 See Innstilling til Odelstinget (Innst. O.) no 92 (1984–85) 7.

184 See eg the preparatory works of the rule on imputed contributory neglect, § 5–1 nos 1 and 3, Innst. O. no 4 (1984–85) 7. See also Rt. 2014, 1192, a case highlighting social considerations.

185 *B. Askeland,* Rettferdighetsideer i norsk personskadeerstatningsrett, in: K. Ketscher/K. Lilleholt/E. Smith/A. Syse (eds), Velferd og rettferd, Festskrift til Asbjørn Kjønstad (2013) 17–34, 29–33.

Part 7 Limitation of liability

I. Introduction

2/126 The Norwegian doctrine of tort law revolves around the causal link between the tortfeasor's act and the damage. There is – as under Germanic law – a need for some kind of limitation of the causal consequences for which the tortfeasor should pay damages[186]. As for the general approach, the equivalence theory and the conditio sine qua non test are the starting point and the first step in a »bifurcated approach«. The second step is named as »limitation of causality« by some scholars, a term resembling that suggested in Basic Questions I[187]. The second step is, however, somewhat confusing because it consists of two separate approaches that are sometimes intertwined. The first approach is a test of whether a condition that qualifies as a conditio sine qua non is so insignificant that it should not be regarded. The other approach is to ask whether a consequence of the damaging act is too remote. Both tests occur in the same case, and depending on the concrete merits of the case, they sometimes revolve around the same factual events, something that leaves an untidy picture. The approaches may be looked upon as alternative ways of justifying a limitation of liability based on the causal connections of the case.

2/127 The Norwegian model of limitation is to set boundaries for liability on a normative and quite discretionary basis. The adequacy test consists of a set of themes that are elaborated from case to case with variable strengths and weights. The themes are varied considerations of values, efficiency, and general conceptions of how the risk stemming from an act or activity should be divided between the tortfeasor and the claimant.

II. The requirements of adequacy

2/128 The rules and principles of Norwegian law regarding adequacy have to some extent the same content as Austrian law; however, some major aspects are missing or are not extensively developed in court practice or the doctrinal literature. Particularly important is that the idea that *the protective purpose of the rules* set bounda-

186 *Nygaard,* Skade og ansvar (2007) 352.
187 *Nygaard,* Skade og ansvar 352 ff; cf Basic Questions I, no 7/5.

ries for adequate causation is present but not as predominantly as in Germanic law[188]. Also, other continental ideas have only pale or non-existing counterparts in the Norwegian doctrine.

2/129 The basic requirements of adequacy are that the damage which occurred was foreseeable *and* that the damage was sufficiently closely connected to the interests of the plaintiff[189]. The latter criterion is most often applied when the damage is caused to a third party, such as in cable cases[190]. In such cases the crucial question has been whether the damaged interest of the victim was sufficiently »concrete and close« to the damaged thing[191].

2/130 The boundaries of adequacy are drawn further where the damage is caused with intent. This view has had theoretical support in older literature[192]. Leading scholars later argued against it[193]. In court practice the reasoning is, however, accepted. Also the presence of gross negligence constitutes a reason for making even remote kinds of damage compensable[194]. When it comes to strict liability, there is no clear doctrine of a wider range of adequacy; however, the case in Rt. 2006, 690 may very well be understood as an indication of such a principle: two trains collided and the cargo on one of the trains leaked out, bringing about an imminent danger of explosion. Many stores and offices in the adjacent town of Lillestrøm had to close and evacuate for several days. The court emphasised that the damage was caused by a typical incident that should be covered by the strict liability for railroads and implicitly argued that the responsibility should therefore be wide and cover remote effects, such as expenses stemming from the need to evacuate due to an impending danger of explosion. The fact that strict liability under Norwegian law has developed via a rigid application of the culpa rule may possibly justify making the range of adequacy wider in strict liability cases than in cases based on culpability.

188 See on this subject *Koch,* Der Ersatz frustrierter Aufwendungen 115–122 (on the »Schutzzwecklehre« and Nordic law). See also *H. Andersson,* Skyddsändamål och adekvans (1993).

189 An important case is Rt. 1973, 1268.

190 See below nos 2/136 and 149; Rt. 1955, 842 and Rt. 1973, 1268.

191 Rt. 1955, 842: a ship lowered an anchor and damaged a cable so that a factory lost electricity and had to temporarily stop production. The interest of the factory was deemed to be sufficiently concrete and closely connected with the damage to the cable.

192 *O. Platou,* Privatrettens almindelige del (1914) 620 f.

193 *Stang,* Erstatningsansvar (1927) 380.

194 Rt. 1960, 359 and Rt. 1973, 1268.

III. Differences between Germanic and Norwegian law regarding adequacy

2/131 Under Norwegian law, the protective purpose of the rule is, as mentioned, not recognised as a special doctrine of limitation of damages. Of course teleological interpretation is a part of the general method of interpretation of statutory provisions, but such interpretation is not very often applied in the field of tort law. The profound ideas of the German and Austrian approach are nevertheless from time to time present in the wide and somewhat indistinct doctrine of adequacy. The idea that the victim must be protected by the rule in question is connected with the question of how written rules affect the culpa norm. The prevailing opinion is that the written rule only defines the duty of care provided that the rule was made to protect the victim[195].

2/132 In other cases the purpose of an Act plays a role in the more precise elaboration of where the boundaries of adequacy should be drawn. In Rt. 1992, 453 a case on public authority liability for lack of control of imported fish that led to fish disease and consequential loss to fish farmers, the purpose of the Act on Fish Disease Control was brought into the reasoning but not, however, as a decisive point[196].

2/133 Because there is no theoretical frame for or no developed doctrine on protective purpose, elements of the idea will and also will not arise in reasoning concerning adequacy depending on the discretion of the court. This is very much in line with the philosophy of leaving much flexibility to the judge. In this way the likelihood of reaching sound decisions is good, but there may be a lack of foreseeability in the application of adequacy tests, something that has been criticised by scholars[197].

2/134 The idea of lawful alternative conduct has not been promoted or developed on a theoretical level in Norwegian tort law. Some of the examples, such as the example of the drunken cyclist (Basic Questions I, no 7/22), would probably have been solved by using general causal explanations.

195 See *Nygaard,* Skade og ansvar 203 f, referring to Rt. 1984, 466 and Rt. 1957, 590. See also *Hagstrøm,* Culpanormen (1985) 54 ff.

196 On the implicit application of the »Schutzzwecklehre« in this case, see *Koch,* Der Ersatz frustrierter Aufwendungen 77–81.

197 On the criticism, see *Nygaard,* Skade og ansvar 354.

IV. The problem of disproportionately vast damage

Under Norwegian law, one of the problems connected with adequate causation has been the assessment of the impact of disproportionately vast damage which has devastating consequences for the tortfeasor who may have limited assets to pay damages. In earlier times this was addressed under the label of adequacy, most clearly in an obiter dictum in Rt. 1955, 1132. The case concerned a bet placed with a bookmaker who failed to send in the coupon, and therefore deprived the man who had bet of a gain that he would have made had the bookmaker acted prudently. The gain was modest, approx NOK 3,000 (€ 360), and the court stated that they might have reasoned otherwise had a larger sum of money been concerned, thereby implicitly suggesting a limitation based on adequacy. **2/135**

A consistent approach was taken by the Supreme Court in the famous cable case in Rt. 1973, 1268, where an airplane crashed into electricity cables, leaving a large number of electricity users with no electricity. The claimant was a fish farmer, who due to the lack of electricity suffered a loss stemming from the fact that a large number of (baby) fish died because the water was not sufficiently hot. In the action against the owner of the airplane, the state, the Supreme Court found that the risk of being ruined by a floodgate of claims in cable cases should speak for limiting the circle of compensable consequences. This was one of a few arguments that supported the decision not to pay compensation to the fish farmer. **2/136**

Later, a debate arose about whether the limitation due to large claims is still valid since a general reduction clause was enacted in Norwegian law. Some scholars maintain that the reasoning in the 1973 case is no longer valid[198]. Others hold the opinion that the flexible borderline of adequacy stands on its own, and that the limitation cannot be changed by the fact that other rules touch upon the same elements[199]. This debate will be elaborated upon below, in connection with the description of the application of the reduction clause. **2/137**

198 *Nygaard,* Skade og ansvar 370.

199 *B. Askeland,* Konkret og nærliggende interesse som avgrensingskriterium ved tredjemannsskader, Jussens venner (2001) 303–318, 312 f.

Part 8 The compensation of the damage

I. The idea of »compensation in full«

2/138 Norwegian law recognises a rule of »compensation in full« for damage. The rule is general and uncodified save for some sectoral provisions[200]. Even the sectoral provisions must be interpreted in the light of the general rule of full compensation.

2/139 The idea of making the amount of compensation dependent on the degree of fault was put forward early in the 20th century in profound theoretical works[201]. The idea was, however, rejected by leading scholars[202]. Ever since, Norwegian doctrine has been built upon a clear precondition of full compensation as the main rule.

2/140 As for damage to things and for pure economic loss, this rule may be interpreted literally, comprising »damnum emergens« and »lucrum cessans«. However, when it comes to the assessment of damages and personal injury awards, the rule is interpreted in a rather reductive way. Thus, the courts have presented interpretations which include other aspects such as that only expenses that are »reasonable and necessary« (»rimelig og nødvendig«) are to be recovered[203]. Furthermore, a victim who is severely injured and must henceforth use a wheelchair should be able to live a life »as fulfilling as possible« (»så fullverdig liv som det er mulig«)[204]. Hence normative components are at play when courts decide the award. An underlying truth is that it is immensely costly to compensate an injured person so that he or she may have a life even slightly resembling life before the accident. Therefore the rule of »full compensation« must be interpreted in a manner that represents a feasible compromise between the tortfeasor (and the liability insurance industry) on the one hand and the victim on the other.

200 Skl. § 4–1.

201 *O. Platou,* Privatrettens almindelige del 620 f and *G. Astrup Hoel,* Risiko og ansvar (1929) 213–218. The latter paired the idea with an idea of proportional liability applicable for situations comprising more than one responsible tortfeasor – thus presenting an alternative to solidary liability.

202 *Stang,* Erstatningsansvar 370–382, 379.

203 See eg Rt. 1999, 1967.

204 See eg Rt. 1996, 967.

II. Lump sum is the main rule

The main rule is that compensation should be awarded in a lump sum[205]. The reason for this is the general purpose of closing the case, so that the parties can move on[206]. Only where special circumstances (»særlige grunner«) are present, may the judge award a periodic sum. This is particularly a good option where the victim suffers from life threatening damage. The option of periodical damages means that the tortfeasor will not have to pay damages for a period longer than the victim will actually live[207]. The rule under Norwegian law is that the loss of income after the victim is dead should not be compensated, even if the responsible tortfeasor is the cause of death[208]. **2/141**

The one time lump-sum solution may be challenged by rational arguments pointing to the fact that the assessment of damages may be quite inaccurate if, for example, the victim dies shortly after a conclusive settlement. The Norwegian tradition of compensation in a lump sum is, however, strong on this point. Whenever the question has been discussed in the preparatory works, the counter arguments have been varied and perceived as more convincing. Such arguments have been that it might be difficult to secure the value of the compensation through the shifting value of the national currency and that paying by annuity may produce administrative costs that otherwise could have been avoided[209]. In addition, the more obvious argument that the tortfeasor may be dead or insolvent at a later stage has of course been put forward. Looking back on the previous discussions, some of the arguments against the periodical solution do not seem strong in modern times. It is a fact that most damages for personal injury are covered by insurance companies. These institutions have the means and ability to buy annuity payments from a financial institution. Such a system is well developed in Sweden, a country in which periodical payments are the main solution in personal injury cases. Furthermore, the question of securing the value of the payment may nowadays be solved by applying the widely used monetary unit of G[210]. The amount of **2/142**

205 See the general rule skl. § 3–9.

206 This is distinctly expressed in the preparatory works, see NOU 1987: 4 and Odelsetingsproposisjon (Ot. prp.) no 81 (1987–88) 32. The rule is maintained in the draft of the new rules on standardised personal injury awards, see NOU 2011: 16.

207 Cf the same »length of life« argument in Basic Questions I, no 8/23.

208 *P. Lødrup,* Personskadekrav hvor skadelidte ikke kan gjøre seg nytte av kompensasjonen pga. død eller andre forhold, in: Rett og rettssal, Festskrift til Rolv Ryssdal (1985) 573–585, 578, 581. See also implicitly Rt. 2006, 684.

209 See Ot. prp. no 81 (1986–87) 37.

210 »G« means (as mentioned above) »sfolketrygdens grunnbeløp«. One G is currently NOK 88,370 (approx € 10,750). G is the »basic amount« in the Norwegian National Insurance scheme. It is fixed by the state once a year in order to adjust national insurance benefits for inflation (this is also explained in FN 13 above).

the monetary unit of G is decided every year in the light of the level of wages and prices in Norway.

2/143 In 2011 a new draft on standardised personal injury awards was drawn up[211]. The committee had a good opportunity to discuss an annuity solution. Even though, as mentioned above, there may be good arguments for choosing the annuity solutions, the committee chose to keep the established rule on lump-sum payments. An important reason for this choice was the fact that the lump-sum system corresponds with the idea of standardisation. As long as the injury awards follow from fixed figures of G in tables of compensation, the logical fulfilment of the system is that the tortfeasor pays the damages once and for all[212].

2/144 It also played a part that the committee in its mandate was encouraged to use the Danish personal injury system – featuring lump-sum solutions – as a model[213]. Moreover, the fact that the victim (and accordingly the tortfeasor – by compensating the victim's expenses) has to pay tax on compensation once it is paid as an annuity was a weighty argument for choosing the lump-sum payment. All in all, given the context of standardisation, it was the best solution for the committee to choose the lump-sum solution.

III. The reduction of the duty to compensate

2/145 Under Norwegian law there is a reduction clause covering all delict cases, see the Norwegian Compensatory Damages Act (NCA) § 5–2. The provision states broadly that in any case where the burden of covering the loss of the plaintiff is »unreasonable«, the award should be reduced accordingly.

2/146 The main purpose of the rule seems to be a way of having an escape clause for the tortfeasor under very special circumstances. The preparatory works mention that the concern for the tortfeasor was the most important motivation for the rule. The preparatory works also focused on the fact that there were reduction clauses in other parts of the tort law area. One should therefore design a general reduction clause in order to secure consistency of law[214].

2/147 As for the other legislative reasons for the reduction clause, they are different from and more pragmatically oriented than the reasons put forward by *Canaris* and *Bydlinski*[215]. The reasoning based on the grounds of social justice seems

211 NOU 2011: 16 Standardisert personskadeerstatning.
212 NOU 2011: 16, 76.
213 NOU 2011: 16, chapter 4.9.4.
214 See Ot. prp. no 75 (1983–84) 65.
215 See Basic Questions I, no 8/26.

to have a sort of equivalent set of thoughts in the Norwegian reasoning liability *(Bydlinski)* in the preparatory works, case law and theoretical comments. On several occasions reference is made to the fact that the reduction is less justified where there is insurance or a possibility of insurance on the defendant's side[216]. Whenever the tortfeasor is insured, the burden is hardly »unreasonable« for the defendant. The idea of reduction is mainly related to situations where there is a defendant who is personally responsible and who has to cover the loss by spending his or her own assets. However, the second sentence in the provision allows for a reduction even if the burden is not unreasonable. Instead reduction may be based on the fact that it is reasonable that the claimant covers parts of the loss. In such cases the reduction clause may also benefit the insurance companies[217]. There are no traces of constitutional principles or principles related to abuse of rights in the history of the Norwegian reduction clause. The discussion on whether the execution and enforcement rules may substitute or make the reduction clause obsolete has also not emerged in Norwegian doctrine.

2/148 The statutory provision skl. § 5–2 contains guidelines for the process of reduction. One should attach weight to the financial status of the tortfeasor, the degree or severity of the fault and other circumstances. This is one of the very few places in the tort law system that recognises the financial status of the tortfeasor as a relevant factor. In most contexts there is a clear perception that the financial status is irrelevant, hereunder also the question of whether there is in fact any insurance involved[218]. The provision opens up a wide margin of discretion. In the preparatory works for the reduction clause, which was enacted in 1985, there are indications that the provision is to be applied only in very exceptional cases. The Supreme Court has, however, reduced the award on a number of occasions. The most far-reaching decisions seem to be cases where the tortfeasor acted with intent and even with criminal intent. In Rt. 2004, 165 a young man who had no financial assets set fire to a home for elderly people. He acted with intent, but the court noted that at the time he was under the influence of drugs. The award was reduced by 50 %. There are also other cases where comparable judgments were given[219]. There are, however, limits to the court's willingness to reduce. Where the gravity of the act is sufficient, it will not matter whether the tortfeasor is without assets. In cases of robbery and a bomb attack, both involving killing or attempting to kill people, the Supreme Court has found that reduction was out of the question[220].

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216 See Ot. prp. no 75 (1983–84) 66.
217 See *Nygaard,* Skade og ansvar (2007) 408.
218 See eg the explicit remark on this point in Rt. 2003, 433.
219 See eg Rt. 1997, 889.
220 See Rt. 2005, 903 and Rt. 2008, 1353.

2/149 As mentioned above, there is, however, another ongoing debate, connected to the limits of adequate cause. This has partly historical reasons: before the general reduction clause was enacted in 1985, the case law suggested that the rule of adequacy might be a salvation for the defendant facing a ruinous claim[221]. The argument of the otherwise ruinous consequences thus was a crucial argument in the famous and important case of liability for third party interests in Rt. 1973, 1268: a plane flew into an electric cable, causing damage to a fish farm which needed the electricity to heat the water for fish. The fish died and the fish farmer claimed compensation from the owner of the plane, the national Ministry of Defence. The defendant was not held liable partly because of the consequences for defendants who potentially might cause damage to a plurality of third parties, such as typically in cable cases where a large number of electricity users may be involved. Scholars have suggested that the enactment of the reduction clause put an end to this case law, so that the argument of ruinous consequences was no longer relevant to the question of adequacy[222]. This is a stance that very much resembles the recommendation made in Basic Questions I in connection with limits of liability[223]. *Askeland* has opposed this view, holding that the argument of ruinous consequences may still be of importance when drawing the limits of adequacy[224]. In Rt. 2003, 338 no 76, the Supreme Court implicitly accepted that a huge loss stemming from a minor accident may lead to limitation of liability based on lack of foreseeability. In another case Rt. 2006, 690 mentioned above in no 2/130, the Supreme Court stated that the ruinous consequences argument might be relevant to the adequacy test; however, it did not apply the argument in the case at hand[225].

2/150 The crucial question on this point is whether the fact that the economic consequences of the tortious act were unforeseeably huge is a decisive point for the test of adequacy. The adequacy test will often refer to the foreseeable physical consequences of an act regardless of the economic consequences. The old example of *von Tuhr* (the horse driver falls asleep, the horse changes direction and the carriage is struck by lightning), which has played a part in the doctrine both in central Europe and in Norway, is an example of physical consequences. Still, as long as the floodgate argument is conceived to be relevant under the question of limitation of causation, one can in my opinion not distinguish between arguments of such limitation and arguments built upon the size of the award. As long as these arguments have been relevant to the doctrine and court practice, the rules and the system will change once the argument of huge awards is transferred to the ques-

221 Rt. 1955, 1132.

222 *Nygaard,* Skade og ansvar 370; *P. Lødrup,* Lærebok i erstatningsrett[5] (2005) 368. See also Rt. 2005, 65.

223 See Basic Questions I, no 7/43.

224 See *B. Askeland,* Konkret og nærliggende interesse som kriterium for tredjemanns tap, Jussens venner (2001) 303–317, 312 f.

225 Rt. 2006, 690 no 57. See also on the subject *Hagstrøm/Stenvik,* Erstatningsrett 421–423.

tion of reduction. One must bear in mind that the question of reduction chronologically emerges only after the question of adequacy is decided. If the argument of the huge award is transferred to the reduction question, more cases than previously will pass the limitation of causation test. Furthermore, in situations where paying the damages is burdensome because there are many claimants, it would be a strange and costly system to allow many claimants to sue and win, and thereafter reduce the damages to a very little sum because it would be too burdensome for the defendant to pay in full to all claimants[226].

2/151 The court practice mentioned above indicates that the reduction clause in Norwegian law is somewhat wider than its European counterparts, and also wider than the reduction clause in soft law regimes, see PEL Liab Dam art 6:202 and PETL 10:401[227]. It is a rule of adequacy that leaves much discretion to judges. It may not be recommendable to transfer more cases to be decided under the wide discretion clause in skl. § 5–2. It would also leave some doubt about the weight of the floodgate argument. In my opinion, the best way forward would be to continue observing the case law as developed before the reduction clause was enacted in 1985. In any event, the self-contradicting practice of the Supreme Court on this point is not satisfactory.

226 These points are put forward in *Askeland,* Jussens venner (2001) 312–315.

227 See the observations made in *B. Askeland,* Spenninger mellom norsk og europeisk erstatningsrett, Nordisk försäkringstidsskrift (NfT) (2006) 127–137, 135 f.

Part 9 Prescription of compensation claims

2/152 The Norwegian system of prescription rules resembles Germanic solutions, nonetheless with some differences regarding the time periods and the commencement of the periods. The legislative reasons for the limitation periods are the well-known viewpoints on the possibility of proving the facts of the case, but also the need for the defendant to move on without risking being sued for acts or activities that he was involved in a long time before the claim. A claim in torts is prescribed three years after the point in time when the claimant was aware of or ought to have been aware of the damage and the responsible party, see Foreldelsesloven 1979 (»Limitation Act«) § 9. The rule thus resembles the German rule on the short period, but however with a difference in commencement date. The German rule, where the time period commences at the end of the year when sufficient knowledge of the claim and the defendant is achieved, is however chosen in the Act on Workmen's Compensation[228].

2/153 The most doubtful question in this area of law has been to decide when the victim had sufficient information to sue the tortfeasor. A string of cases shows that the question is governed by a rule that resembles the culpa norm[229]. This is natural since the main requisite for prescription is that the claimant ought to have the knowledge sufficient for a lawsuit[230].

2/154 As for the long prescription period, it is 20 years, commencing from the end of the damaging act. In principle the commencement may be prior to the occurrence of the damage. This is a solution that seems to have no counterpart in the Germanic rules on prescription. The rule is, however, well founded, especially in cases where the damaging act lasts for a long time, such as in the case of emissions and other continuous damaging activities.

2/155 There is, however, an exception for personal injuries that are sustained by a person under 18 years of age and where the tortfeasor knew or ought to have known that the activity might lead to personal injury. Claims based on injuries under such circumstances will never prescribe. The exception was included in the relevant Act in the nineties as a response to cases of sexual abuse of children, who dared not or, for other reasons, could not file a lawsuit within ordinary time limits. Such victims may often have problems that make it difficult for them to sue before

228 See Yrkesskadeforsikringsloven (Workmen's Compensation Insurance) § 15 first section.
229 Rt. 1960, 748; Rt. 1977, 1092; Rt. 1982, 588; Rt. 1986, 1019 and Rt. 1997, 1070.
230 See further on the requirements *Nygaard,* Skade og ansvar 428–430.

they become adults. A 20-year long stop rule might otherwise prevent these victims from claiming their rights.

2/156 The limitation rules referred to apply only to non-contractual liability, however with an exemption for personal injuries occurring in connection with the performance of a contract: see skl. § 9, third section.

2/157 The idea of reversing the burden of proof after half of the prescription period seems to be a progressive and interesting solution. It has, however, never been aired in the Norwegian debate. The relatively short period of three years may not invite the solution in the same way as the longer period in Austrian law does.

Poland

Katarzyna Ludwichowska-Redo

Basic Questions of Tort Law from a Polish Perspective

Chapter 3

Basic Questions of Tort Law from a Polish Perspective

Katarzyna Ludwichowska-Redo

Part 1 Introduction

Although the rule of »casum sentit dominus« is not expressed in any of the provisions of the Civil Code (kodeks cywilny; hereinafter KC)[1], its significance as a principle underlying Polish tort law cannot be questioned. It stands without doubt that losses can be passed on to persons other than the victim only if *particular reasons* exist that justify such a transfer. 3/1

As in many other European countries, a tendency has been noted in Poland over the last decades to strengthen the protection of tort victims[2]; one could say that there has been an increase in the number of reasons recognised as justifying the shifting of damage to persons other than the one who sustained it as well as a trend towards acknowledging reasons already accepted as such in areas in which they did not hitherto play a role. Several examples will be drawn on to illustrate this tendency. One of them is the growing significance of responsibility independent of fault, which has recently been introduced in the field of liability for the exercise of public authority (art 417 ff KC; see no 3/96 below) as well as in the area of product liability (art 449[1] ff KC). A trend towards objectivising fault-based liability may also be discerned: there is, for example, a tendency to assume the liability of a legal entity for the acts of its organs (art 416 KC) based only on the unlawfulness of conduct, passing over the issue of individual accusations directed against 3/2

1 Act of 23 April 1964, consolidated text Dziennik Ustaw (Journal of Laws, Dz U) 2014, item 121.

2 On this tendency see *M. Nesterowicz,* Tendencje rozwojowe odpowiedzialności deliktowej w końcu XX i początkach XXI wieku a ochrona poszkodowanego w prawie polskim, in: M. Nesterowicz (ed), Czyny niedozwolone w prawie polskim i prawie porównawczym (2012).

organ members[3]; the concept of »anonymous fault« is used in cases of damage infliction by one or more of a group of persons to whom the same liability rule applies, which means that the individual characteristics of the actual perpetrator are ignored[4]. The notion of a delict has been stretched to include violations of deontological norms, and tortious liability may also be triggered by the provision of untrue information[5]. In the early 1990s art 446[1] was introduced into the Civil Code, explicitly allowing a child to demand the redress of damage that it suffered before being born, and in recent years Polish case law has developed rules on liability for both pecuniary and non-pecuniary damage caused by unwanted birth (see no 3/75 f below). Since 2008 the closest family members of a deceased tort victim may claim compensation for moral harm (art 446 § 4 KC)[6].

3/3 The following contribution is concerned solely with tort law; other schemes allowing for the shifting of damage, such as social security law or insurance law, are only mentioned insofar as necessary to show the place of the law of delict within the Polish legal system. Tortious liability is also set against the background of instruments which, unlike tort law, are not aimed at compensating the injured party, but which likewise serve the protection of rights and interests.

3/4 The idea of replacing certain areas of liability law, and more specifically traffic and medical liability, with insurance-based solutions[7], or of supplementing the law of damages with such solutions, has been considered in Poland[8], but has not met with much approval in areas other than medical treatment. As recently as 2011[9], a new extra-judicial compensation system for victims of medical

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3 For more on this, *P. Machnikowski* in: A. Olejniczak (ed), System Prawa Prywatnego, vol VI. Prawo zobowiązań – część ogólna (2009) 418 f.

4 *Machnikowski* in: Olejniczak, System Prawa Prywatnego 417 f. On the objectivisation of fault see also no 3/119 below.

5 *Nesterowicz* in: Nesterowicz, Czyny niedozwolone 35 and the literature cited therein.

6 See, inter alia, *E. Bagińska,* Roszczenie o zadośćuczynienie na podstawie art 446 § 4 kodeksu cywilnego na tle doświadczeń europejskich, in: K. Ludwichowska (ed), Kompensacja szkód komunikacyjnych – nowoczesne rozwiązania ubezpieczeniowe/Traffic Accident Compensation – Modern Insurance Solutions (2011) 149 ff.

7 *H. Koziol,* Basic Questions of Tort Law from a Germanic Perspective I (2012) no 1/9.

8 With regard to medical treatment, see *K. Bączyk-Rozwadowska,* Odpowiedzialność cywilna za szkody wyrządzone przy leczeniu (2007) 381 f and the literature cited therein; for the pros and cons of no-fault insurance schemes in the field of traffic accidents, see *K. Ludwichowska,* Odpowiedzialność cywilna i ubezpieczeniowa za wypadki samochodowe (2008) 367 f; *eadem,* Koncepcja no-fault w kompensacji szkód komunikacyjnych, in: K. Ludwichowska (ed), Kompensacja szkód komunikacyjnych – nowoczesne rozwiązania ubezpieczeniowe/Traffic Accident Compensation – Modern Insurance Solutions (2011) 33 ff.

9 Ustawa o zmianie ustawy o prawach pacjenta i Rzeczniku Praw Pacjenta oraz ustawy o ubezpieczeniach obowiązkowych, Ubezpieczeniowym Funduszu Gwarancyjnym i Polskim Biurze Ubezpieczycieli Komunikacyjnych of 28.4.2011, Dz U 2011 no 113, item 660, which inter alia introduced chapter 13a to the Act on Patients' Rights and Patients' Ombudsman of 6.11.2008 (Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta), consolidated text Dz U 2012, item 159 with later amendments.

injuries was introduced[10], which, although inspired by *no-fault* patient insurance schemes[11], cannot itself be regarded as such due to the fact that it only provides compensation if an infection, bodily injury, health disorder or death of a patient resulted from an event *inconsistent with current medical knowledge* (a so-called »medical event«)[12], which implies negligence[13]. Also, the new system does not deprive the injured party of the possibility to take action in tort: the patient is allowed to choose whether to make use of the out-of-court scheme or to follow the path of the law of damages[14]. And finally, medical event insurance, constituting an essential element of the system and designed as compulsory, was temporarily made non-compulsory[15] due to problems with the execution of the obligation to insure; therefore in the end, at least for the time being, the scheme cannot be described as »insurance-based«.

3/5 As *Koziol* indicates, the borders between tort law and its »neighbouring fields« may be somewhat blurred[16]; there should, however, be no doubt that this should not lead to, and cannot justify, implanting into the law of delict concepts that cannot be reconciled with its fundamental aims, such as punitive damages (see no 3/33 below).

3/6 A good example of »blurred boundaries« is the division between a claim for the restoration of a lawful position and a claim for compensation by means of natural restitution (see the remarks on actio negatoria at no 3/21 f below). In such cases, as *Koziol* points out, it would be sensible to allow for a »fluid transition« between the two areas in question rather than keep to sharp distinctions[17] (ie in the case of actio negatoria give up adhering to one set of prerequisites and one set of consequences and allow for their differentiation[18]). No such tendency can, however, be discerned in Polish law. Instead, the focus is on the *distinction* between the two claims and attention is paid to aligning the extent of *restoration of a lawful*

10 For more on the system, see *E. Bagińska,* The New Extra-Judicial Compensation System for Victims of Medical Malpractice and Accidents in Poland, Journal of European Tort Law (JETL) 2012, 101 f.

11 See the grounds for the draft of the Act of 28.4.2011 (FN 9 above), Druk Sejmowy no 3488.

12 For the precise definition of a medical event see art 67a of the Act on Patients' Rights and Patients' Ombudsman.

13 See, inter alia, *Nesterowicz* in: Nesterowicz, Czyny niedozwolone 41; *M. Serwach,* Charakterystyka i zakres odpowiedzialności za zdarzenia medyczne, Prawo Asekuracyjne (PA) no 3/2011, 12.

14 If, however, he/she opts for the new system and accepts an offer of compensation within this system, he/she must waive the rights to *all claims for pecuniary and non-pecuniary damages* which may result from the event qualified as a medical event (art 67 k sec 6 of the Act on Patients' Rights and Patients' Ombudsman).

15 *M. Serwach,* Ubezpieczenia z tytułu zdarzeń medycznych w teorii i praktyce, PA no 4/2012, 4 ff.

16 Basic Questions I, no 1/17.

17 Basic Questions I, no 1/18.

18 Basic Questions I, no 2/24.

position to the prerequisites of actio negatoria, which are more lenient than those of a tortious claim.

3/7 *Koziol's* support of fluid transitions manifests itself very clearly in the area of alternative causation between an incident which generates liability and a chance, where he strongly criticises the *all-or-nothing* principle and supports the idea of liability apportionment[19]. Polish tort law does not, however, recognise potential causation, which speaks against adopting such a solution in these cases (see no 3/85 below).

3/8 Although in essence not a question of blurred boundaries[20], tort law's interaction with the law of unjust enrichment is nevertheless very interesting. The fact that the tortfeasor gained an advantage from his tort is irrelevant for the extent of the duty to compensate (in the sense that it cannot lead to compensation exceeding the damage suffered), which may be considered problematic when in a given case the victim does not have an unjust enrichment claim at his disposal (see no 3/27 below)[21]. On the other hand, the enriched person's obligation to reckon with the duty to return the advantage, assessed according to an objective yardstick, results in the existence of such a duty even if the person is no longer enriched (see no 3/24 below). It may therefore be said that the enriched person's conduct leads to him having to bear the burden of the impoverished person's loss[22].

3/9 Polish law clearly distinguishes between tort law and breaches of contract and does not formally recognise any interim area, which means that each case is allocated either to the field of contract, or to the realm of tort, or to both with a right to choose the liability regime, but not »in between«. It should, however, be briefly noted here that a view has been expressed which considers liability for culpa in contrahendo as a special regime, separate from both tort and contract (see especially nos 3/52 and 3/60 below).

3/10 It seems correct to speak of a dual-lane structure of Polish tort law[23] in that two main liability grounds are distinguished: fault-based and strict liability[24]. That said, it must be noted that a certain approximation may be discerned between fault and non-fault based liability due to the objectivisation of fault (see no 3/119 below). Also, neither fault-based nor strict liability is a uniform area. Within the latter, different levels of strictness can be discerned[25], while within the former the

19 Basic Questions I, nos 1/27, 5/87 ff.

20 Basic Questions I, no 1/19.

21 Basic Questions I, no 2/36 f.

22 For more on this issue, as well as on *Koziol's* proposal to introduce a general claim for a disgorgement of profit, see no 3/31 below.

23 Cf Basic Questions I, no 1/21 and the literature quoted therein.

24 Liability based on equity cannot be treated as a ground of equal significance as it is only introduced as an exception.

25 See no 3/130 below. On the various legislative solutions within the field of strict liability see *J. Łopuski,* Odpowiedzialność za szkody wyrządzone w związku z użyciem sił przyrody (art 152

standard of care varies depending on the type of relations in question (art 355 § 1 KC) and is more stringent if the perpetrator acts as a professional (art 355 § 2 KC); also, the reversal of the burden of proof of fault (arts 427, 429, 431 KC) makes fault-based liability stricter; and finally, the term »fault« may be ascribed more than one meaning (see the remarks on the understanding of »fault in selection« at no 3/123 below).

3/11 *Wilburg's* flexible system, considered and advocated by *Koziol* in »Basic Questions of Tort Law from a Germanic Perspective«, is not known to Polish tort law, which at its core adheres to clear-cut rules, supplemented by general clauses allowing for a certain amount of discretion. In order for delictual liability to arise, all its prerequisites must be fulfilled; responsibility cannot therefore be affirmed if one of the conditions for liability is not satisfied, even if the weight of other factors exceeds what is usually required. And while it is true that the flexible system, with its support for fluid transitions and rejection of abrupt either-or solutions, offers sensible answers to numerous complex problems and is capable of »encompassing all imaginable cases and their special qualities«[26], it is also rather complicated, which means that its adoption would place the bar very high for all those involved in the process of law application. If even the comparably »hard and fast« rules of the present system cause many problems and leave countless questions open, one can only imagine how difficult and demanding it would be to apply a scheme whose very essence is flexibility.

3/12 The following report looks at the basic questions of tort law from the point of view of the Polish legal system. In order to accentuate similarities and differences, references are made to solutions adopted or proposed in the Germanic jurisdictions as presented in *H. Koziol's* book »Basic Questions of Tort Law from a Germanic Perspective«, which forms a basis for this contribution with regard to both structure and content.

k.z.): jej znaczenie i ewolucja w perspektywie minionego 70-lecia, Kwartalnik Prawa Prywatnego (KPP) no 3/2004, 672.

26 Basic Questions I, no 1/28 and *W. Wilburg,* Die Entwicklung eines beweglichen Systems im bürgerlichen Recht (1950) cited therein.

Part 2 The law of damages within the system for the protection of rights and legal interests

I. In general

3/13 A claim for damages offers far-reaching protection of rights and interests, but is also subject to strict requirements. A mere interference with protected interests is not enough to justify such a claim; further conditions must be fulfilled, such as unlawfulness and fault, or risk posed by a particular activity[27]. The law of damages is, however, only one of the remedies provided by the legal system to serve the protection of rights and interests. The following chapter looks at other available instruments and at their interplay with the law of damages.

II. Claims for recovery

3/14 As in German and Austrian law, *rei vindicatio* (art 222 § 1 KC) merely requires that the claimant (owner) is entitled to possess a thing (or, to be more precise, to *hold actual control* over it) while the defendant is not, and is directed at the surrender and recovery of the thing in the condition it is found at the time of the claim[28]. Since compensation in kind is available to the victim under art 363 § 1 KC, the recovery of a thing may also be effected under the stricter requirements of the law of damages. Under these more stringent conditions the claimant may, however, not only retrieve the thing as it is, but also demand the redress of consequential harm caused by the loss of possession.

3/15 Polish law also takes care of the owner's interests by equipping him with so-called »supplementary claims« against the unauthorised possessor (ie a claim for the remuneration for using a thing, a claim for compensation for wear and tear, deterioration or loss of a thing, and a claim for profits or for the value of consumed profits; arts 224 f KC), but these claims, unlike rei vindicatio, are not objective in nature, that is they depend on the bad or good faith of the possessor, and to a certain extent also on fault on his part[29].

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27 These are dealt with in detail below.

28 *T. Dybowski,* Ochrona własności w polskim prawie cywilnym (rei vindicatio-actio negatoria) (1969) 136 f.

29 The claims for remuneration for using a thing, compensation for wear and tear and deterioration or loss of a thing cannot be pursued against a possessor in good faith, who is also entitled to acquire ownership of natural profits detached from the thing during the period of his possession and retain the civil profits collected, if they became payable during that time. The

The supplementary claims regulated in arts 224 f are regarded as leges speciales in relation to the general rules on tortious liability and unjust enrichment[30]. 3/16

III. Preventive injunctions

There are several provisions regulating preventive injunctions in Polish private law. Apart from the general rule of art 439 KC, which is dealt with under no 3/18 below, the following provisions, which introduce injunctions that are more limited in scope, must be mentioned: art 24 § 1 KC, which concerns actions endangering personality rights[31]; art 78 of the Copyright Act[32], dealing with actions threatening authors' personal rights; art 285 of the Industrial Property Law[33], which regulates, inter alia, actions endangering patent rights; art 18 s 1 of Unfair Competition Act[34], concerning the endangerment of an entrepreneur's interest by an act of unfair competition. These »limited« injunctions do not form a consistent system, which fact has thwarted attempts to reconstruct any general rules common to all of them[35]. It may, however, be noted that, like in the Germanic legal systems, fault is not considered 3/17

possessor in bad faith must provide remuneration for the use of a thing and is responsible for its wear and tear, deterioration or loss, unless the deterioration or loss would also have ensued if the thing had been in possession of the entitled person (he/she is therefore liable for *casus mixtus,* so his/her liability is stricter than traditional fault-based tortious liability); he is also obliged to return the collected profits that he/she did not consume and to pay the value of profits he consumed, as well as to return the value of profits which he/she failed to obtain due to bad management. Special rules apply to the possessor in good faith from the moment he/she learned about the action for the recovery of the thing being brought against him/her: he/she is obliged to return the collected profits that he/she did not consume and to pay the value of profits consumed as well as to pay remuneration for the use of the thing. He/she is also responsible for the wear and tear as well as for the thing's deterioration or loss, unless the deterioration or loss happened without his/her fault (his/her liability is therefore based on presumed fault).

30 *E. Gniewek* in: T. Dybowski (ed), System Prawa Prywatnego, vol III. Prawo rzeczowe (2007) 515 and the literature cited therein.

31 To be precise, art 24 concerns actions endangering *dobra osobiste,* which translate more closely as »personal interests«. »Dobra osobiste« are defined as values recognised by society, covering a person's physical and mental integrity, individuality, dignity as well as his/her position in society, and being a prerequisite for the person's self-realisation; see *Z. Radwański,* Prawo cywilne – część ogólna (2005) 160 f. In this report »dobra osobiste« are referred to as personality rights – a term which seems to work better in a comparative context.

32 Ustawa o prawie autorskim i prawach pokrewnych (Act of 4.2.1994, consolidated text Dz U 2006, no 90, item 631).

33 Prawo własności przemysłowej (Act of 30.6.2000, consolidated text Dz U 2013, item 1410).

34 Ustawa o zwalczaniu nieuczciwej konkurencji (Act of 16.4.1993, consolidated text Dz U 2003, no 153, item 1503 with later amendments).

35 *A. Śmieja* in: A. Olejniczak (ed), System Prawa Prywatnego, vol VI. Prawo zobowiązań – część ogólna (2009) 630.

a prerequisite for the entitlement to such injunctions; unlawful endangerment is in principle sufficient. Unlawfulness of actions endangering personality rights is presumed[36] and understood broadly[37], that is as an *infringement of a legal provision or the »principles of community life«*[38]. The prerequisite for a preventive injunction based on art 18 of the Unfair Competition Act is the commission of an act of unfair competition, that is an act *contrary to law or bonos mores* which endangers or infringes the interests of another entrepreneur (art 3 of the Act). As for art 285 of the Industrial Property Law, it is emphasised that the claimant should prove that the defendant undertook actions »threatening to infringe a specific industrial property right«[39].

3/18 A general provision regulating preventive injunctions is art 439 KC, which states that »a person who is directly exposed to the risk of damage resulting from the behaviour of another person, in particular due to lack of proper supervision of the operation of an enterprise or business controlled by him, or of the condition of a building or any other installation possessed by him, may demand that that person undertakes any measures necessary to avert the immediate danger, and, if necessary, also to give adequate security«[40]. In contrast to the aforementioned regulations (see no 3/17), art 439 KC, which is rarely applied in practice[41], is broader in scope in that it not only encompasses preventive injunctions, but also allows for claims for positive actions aimed at warding off the peril; indeed, the former, which are being considered here, are deemed to come into question less often[42]. There are several theories as to the requirements of a preventive claim based on art 439 KC: 1) It is enough that there is a causal connection between the threatening behaviour and the direct threat of damage; the behaviour does not need to be unlawful (this view is chronogically the oldest and no longer represented); 2) the threatening behaviour must be faulty (this theory is criticised for transferring a rule typical for liability for damages to an institution not aimed at ensuring compensation but at preventing harm from happening[43]); 3) the requirements of a preventive injunction depend on the basis of liability which would arise in the case of damage infliction; 4) the threatening behaviour must be unlawful[44].

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36 With regard to authors' personal rights, see *A. Wojciechowska* in: J. Barta (ed), System Prawa Prywatnego, vol XIII². Prawo autorskie (2007) 702.

37 *M. Pazdan* in: K. Pietrzykowski (ed), Kodeks cywilny, vol I. Komentarz do Art 1-449¹⁰ (2011) 155.

38 Ie moral rules of conduct universally accepted in society (see also FN 303 below).

39 *A. Tischner* in: P. Kostański (ed), Prawo własności przemysłowej (2010) 1144.

40 Translation by *E. Bagińska,* Poland, in: K. Oliphant/B.C. Steininger (eds), European Tort Law. Basic Texts (2011) 196.

41 *Śmieja* even regards it as in principle »dead«; see *Śmieja* in: Olejniczak, System Prawa Prywatnego 643.

42 *Śmieja* in: Olejniczak, System Prawa Prywatnego 638.

43 Ibidem 631.

44 On these theories, see, inter alia, *M. Safjan* in: K. Pietrzykowski (ed), Kodeks cywilny, vol I. Komentarz do Art 1-449¹⁰ (2011) 1694 f; *Śmieja* in: Olejniczak, System Prawa Prywatnego 625 ff.

IV. Rights to self-defence

A person who acts in self-defence against a direct and unlawful attack at his own interest or at the interest of another person, is not liable for damage caused to the attacker (art 423 KC). The value of the interest against which the attack is directed is irrelevant[45]. In order for liability to be excluded, it must be *necessary* to repel an *unlawful* attack and at the same time *not possible to do it in a way less detrimental to the legally protected interests of the attacker*[46]. The perpetrator is not obliged to repair damage caused to the attacker if the means used by him/her were appropriate in the situation in question, given the purpose of their use (countering an unlawful attack). The unlawfulness of the attack is to be understood broadly, that is as an infringement of the law or of the principles of community life[47]. **3/19**

V. Reparative injunctions

Article 222 § 2 KC, which regulates actio negatoria, states that an owner is entitled to demand *the restoration of a lawful position* as well as the *cessation of infringements* from the person who infringes ownership in a manner other than by depriving the owner of actual control over the thing. The claim has a purely objective character, meaning that it does not depend on any subjective elements such as fault or good/bad faith. Its sole prerequisite is the *infringement of ownership.* In order to justify actio negatoria, the infringement must be *unlawful,* but since the right of ownership is very broad in scope, it is safe to say that practically all interferences with the owner's sphere of control over a thing are unlawful, unless they are justified by a legal provision[48]. **3/20**

The difference in wording between art 222 § 2 KC and art 363 § 1 KC is a clear indicator that the Polish legislator distinguishes between restoring a *lawful position* and restoring *the previous position* under art 363 KC, which deals with compensation of damage (see no 3/160 below)[49]. It is, however, not entirely clear where exactly the border should be drawn between actio negatoria and a claim for compensation. *Dybowski* stresses that the former is directed against current unlawful **3/21**

45 *Z. Banaszczyk* in: K. Pietrzykowski (ed), Kodeks cywilny, vol I. Komentarz do Art 1-449[10] (2011) 1639.

46 Cf, inter alia, *A. Olejniczak* in: A. Kidyba (ed), Kodeks cywilny. Komentarz, vol III. Zobowiązania – część ogólna (2010) commentary to art 423, no 6.

47 Supreme Court (Sąd Najwyższy; hereinafter: SN) judgment of 4.5.1965, I CR 5/65, LEX no 5796.

48 *Dybowski,* Ochrona własności 316.

49 See, inter alia, *S. Rudnicki,* Komentarz do kodeksu cywilnego. Księga druga. Własność i inne prawa rzeczowe (2007) 344.

interferences in another's sphere, while the target of compensation claims is already inflicted damage, which may result from such unlawful interference, but is not a necessary consequence thereof[50]. There is generally no doubt as to the fact that actio negatoria does not encompass a claim for monetary reparation, especially not for lucrum cessans[51]. A view has been expressed that »restoring a lawful position« means not only ceasing the interference with another's property, but also removing the effects of such interference (eg evening out an unlawfully dug ditch, removing an unlawfully constructed fence)[52]. Adoption of this view makes it necessary to determine how far a claim for positive action can stretch. It seems reasonable that actio negatoria, whose prerequisites are more lenient than those of a claim for compensation, should not reach as far as the latter; in other words, the owner should not be able to demand natural restitution to the extent that the injured party is entitled to require it under art 363 KC. *Dybowski* convincingly argues that the owner can solely demand that the interferer withdraws from the boundaries of his/her ownership and takes only such actions as are necessary to effect the withdrawal (ie actions necessary to restore the owner's undisturbed control of his/her thing)[53]; these actions may sometimes converge to a certain extent with actions aimed at restoring the previous state of affairs[54]. Anything above and beyond can be claimed under the provisions of the law of obligations, provided that all prerequisites of liability are fulfilled.

3/22 It follows from the above that the claim for restoration of a lawful position based on art 222 § 2 KC is regarded as a uniform claim under Polish law; a differentiation of its prerequisites depending on the consequences for the disturber (ie whether he/she is only obliged to tolerate the removal or also to actively remove the disturbance), although undoubtedly sensible[55], has not hitherto been put forward. De lege lata splitting the claim for restoring a lawful position into two separate claims (a claim for non-facere and pati on the one hand and a claim for positive action to remove the disturbance on the other) with different grounds for imputation does not seem possible.

3/23 Other examples of reparative injunctions are provided by art 24 § 1 KC (claim for the cessation of an action infringing a personality right as well as for the removal of the consequences of the infringement), art 78 of the Copyright Act (claim for the cessation of an action infringing an author's personal right as well as for

50 *Dybowski,* Ochrona własności 311.
51 Ibidem 339 f.
52 *A. Cisek* in: E. Gniewek (ed), Kodeks cywilny. Komentarz (2011) 374; *Rudnicki,* Komentarz do kodeksu cywilnego 344 f; see also, inter alia, SN judgment of 14.5.2000, V CKN 1021/00, LEX no 55512.
53 *Dybowski,* Ochrona własności 350.
54 Ibidem 352.
55 Basic Questions I, no 2/24.

the removal of the consequences of the infringement), art 79 of the Copyright Act (claim for the cessation of an infringement of a copyright as well as for the removal of the consequences of the infringement); art 18 of the Unfair Competition Act (claim for the cessation of prohibited actions as well as for the removal of their consequences in the case of an infringement of an entrepreneur's interest by an act of unfair competition); art 287 of the Industrial Property Law (claim for the cessation of an infringement of a patent). All these claims are non-fault based[56] and dependent on the existence of an infringement.

VI. Unjust enrichment by interference

A. The relationship between claims for unjust enrichment and claims for damages

3/24 As pointed out by *Koziol,* claims for damages and unjust enrichment claims are similar in that they both require an interference with the protected interests of another person[57], but differ from one another as far as their goals and prerequisites are concerned. This is true also in Polish law. An unjust enrichment claim (art 405 ff KC) does not require fault or any other imputation ground typical for tortious liability. It is triggered by the enrichment of one person at the expense of another (thus impoverished) person[58]. The behaviour of the liable party is generally irrelevant for the existence of a duty to return the advantage, although there is an exception to this rule: if the enriched person *should have taken into account the duty to return while consuming the advantage or disposing of it,* he/she is still obliged to return even if he/she is no longer enriched (art 409 KC). It is indicated that when assessing whether the enriched party was obliged to reckon with the duty to re-

56 See *Pazdan* in: Pietrzykowski, Kodeks cywilny 154 (ad art 24 KC); *J. Barta/R. Markiewicz* in: J. Barta/R. Markiewicz (eds), Prawo autorskie i prawa pokrewne. Komentarz (2011), commentary to art 78, no 2 (ad art 78 of the Copyright Act); *J. Błeszyński* in: J. Barta (ed), System Prawa Prywatnego, vol XIII². Prawo autorskie (2007) 633 (ad art 79 of the Copyright Act); *J. Rasiewicz* in: M. Zdyb/M. Sieradzka (eds), Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz (2011), commentary to art 18, no 14 (ad art 18 of the Unfair Competition Act); *A. Tischner,* Komentarz do zmiany art 287 ustawy – Prawo własności przemysłowej wprowadzonej przez Dz U 2007, no 99, item 662, in: T. Targosz/A. Tischner (eds), Komentarz do ustawy z dnia 9 maja 2007 r. o zmianie ustawy o prawie autorskim i prawach pokrewnych oraz niektórych innych ustaw (2008) no 4 (ad art 287 of Industrial Property Law).

57 Basic Questions I, no 2/26.

58 Several authors do not treat impoverishment as the prerequisite for a duty to return the advantage; see *P. Mostowik* in: A. Olejniczak (ed), System Prawa Prywatnego, vol VI. Prawo zobowiązań – część ogólna (2009) 246 f.

turn, an *objective yardstick* should be applied[59]. *Czachórski* points out that since there is no mention of fault in art 409, resorting to this term would not be justified[60], although one cannot help but make an association with a divergence from the pattern of careful conduct and hence with negligence.

3/25 Polish legal writers define impoverishment as a disadvantage relating to property[61] and *Pietrzykowski* emphasises its likeness to pecuniary damage[62]. The claim based on art 405 KC is, however, not aimed at compensating damage, but at *disgorging advantage* gained by the interferer, so it does not arise if there is no enrichment[63]. Accordingly, in the case of loss of profits, a claim for disgorgement is only justified if the profit went to the interferer; it is not enough that it was lost by the impoverished party[64].

3/26 In situations where the prerequisites for both claims are met, the disadvantaged party may choose whether to pursue a claim in tort or an unjustified enrichment claim (art 414 KC: »The provisions of the present title shall not prejudice the provisions on the duty to redress damage«)[65].

3/27 It is stressed that the impoverishment and the enrichment must have a joint source, meaning that the same event must be both a necessary and a sufficient cause of both the former and the latter[66]. A destruction of machines such as in one of the examples provided by *Koziol*[67] does not fulfil this prerequisite. It constitutes the impoverishment, but in order for the other party to become enriched, it is necessary for other conditions to be fulfilled[68] (eg customers must turn to him rather than, for instance, give up acquiring goods produced by both competitors). The same can be said about causing a competitor's incapacity to work. The law of unjust enrichment is therefore inapplicable in these cases. The law of tort, on the other hand, as rightly pointed out by *Koziol,* has certain shortcomings[69]: it is directed at the compensation of damage suffered, so if profit incurred by the

59 *W. Czachórski,* Prawo zobowiązań w zarysie (1968) 225; *K. Pietrzykowski* in: K. Pietrzykowski (ed), Kodeks cywilny, vol I. Komentarz do Art 1-449[10] (2011) 1533.

60 *Czachórski,* Prawo zobowiązań 225.

61 *E. Łętowska,* Bezpodstawne wzbogacenie (2000) 63; *Pietrzykowski* in: Pietrzykowski, Kodeks cywilny 1524.

62 *Pietrzykowski* in: Pietrzykowski, Kodeks cywilny 1524.

63 *Łętowska,* Bezpodstawne 73.

64 *Śmieja* in: Olejniczak, System Prawa Prywatnego 246.

65 SN judgment of 14.12.1983, IV CR 450/83, Orzecznictwo Sądów Polskich (OSP) no 12/1984 item 250.

66 Cf, inter alia, *Łętowska,* Bezpodstawne 73. A comparison is made with the opening of a dam connecting a river with an artificial lake, which causes the river to rise and the elevation of the lake to drop; *Z. Radwański/A. Olejniczak,* Zobowiązania – część ogólna (2010) 289.

67 Basic Questions I, no 2/33.

68 It is reiterated that acquiring the possibility of enrichment is not enough to trigger an unjust enrichment claim (See *Łętowska,* Bezpodstawne 69), which seems relevant in this context.

69 Basic Questions I, no 2/36 f.

tortfeasor exceeds the amount of damage, he/she is left with a profit even after compensating the victim in full.

B. Approaches to solutions in intellectual property law

3/28 Both the Polish Industrial Property Law and the Copyright Act provide for a claim for disgorgement of profit. Art 287 of the former states that a patent holder whose patent has been infringed shall be entitled to demand that the interferer returns unjustly obtained profits and, in the case of a culpable infringement, makes good the damage inflicted either in accordance with the general principles, or through the payment of an appropriate sum of money corresponding to the license fee or other appropriate remuneration due to the patent holder. A claim for disgorgement of profit, which is independent of the interferer's fault, can therefore be cumulated with a claim for damages, which requires the tortfeasor's fault and which, depending on the victim's preference, is either subject to the general principles of the Civil Code, or takes on the form of a »claim for use«. This solution is therefore quite different from that provided by the Austrian Patent Act[70].

3/29 Article 79 of the Polish Copyright Act similarly entitles the victim to seek disgorgement of profit obtained by the interferer irrespective of the latter's fault. It also equips him/her with a claim for damages either in accordance with the general principles, or through the payment of an appropriate sum of money corresponding to *double* or, where the infringement was culpable, *triple* the amount of remuneration due to him/her for the use of his/her work. Unlike in the Industrial Property Law, a punitive element is present here (see also no 3/34); the claim for appropriate compensation is therefore not a typical »claim for use«.

3/30 As already stated, a claim for disgorgement of profit is independent of the interferer's fault and as such subject to considerably more lenient requirements than a claim for damages. In accordance with the majority view, the Copyright Act claim for disgorgement of profit is to be distinguished from the unjustified enrichment claim regulated in the Civil Code[71]. With regard to the claim for disgorgement of profit based on art 287 of the Industrial Property Law, diverging views are presented: one treats it as an unjustified enrichment claim, and the other as a separate claim to which Civil Code provisions on unjustified enrichment are not

70 Basic Questions I, no 2/38 f.

71 *Barta/Markiewicz* in: Barta/Markiewicz, Prawo autorskie, commentary to art 79, nos 21, 25; *Błeszyński* in: Barta, System Prawa Prywatnego 659 f; *K. Sarek,* Roszczenie o wydanie uzyskanych korzyści, in: J. Jastrzębski (ed), Odpowiedzialność odszkodowawcza (2007) 234; see also, on the basis of the 1952 Copyright Act, *A. Kopff,* Roszczenie o wydanie uzyskanych korzyści w prawie autorskim i wynalazczym a roszczenie z tytułu bezpodstawnego wzbogacenia, in: Z. Radwański (ed), Studia z prawa zobowiązań (1979) 24.

applicable. Supporters of the latter view point out that case law and literature concerning the claim for disgorgement of profit based on art 79 of the Copyright Act are also relevant for the claim regulated in art 287 of the Industrial Property Law[72].

C. A new type of claim?

3/31 It is emphasised that claims for disgorgement of profit mirror the principle that unlawful interference with another's pecuniary rights should not be in any way profitable to the interferer[73]. Introducing such claims to the field of intellectual property law is a clear sign that the legislator is aware of the problem of wrongfully obtained gains, but does not mean that it is possible to automatically recognise parallel claims in other areas of law. As *Koziol* points out, introducing a new type of claim – a general claim for disgorgement of profit obtained through interference which does not consist in use in the usual sense, constituting a mixture of a damages claim and an unjust enrichment claim – would be a bold step[74], which is not possible in Poland without an explicit legal provision. Notwithstanding this, the proposal to introduce such a claim is certainly worth a thought, especially as *Koziol's* arguments in its favour are very convincing. Considering the possible introduction of a claim for disgorgement of profit should be preceded by an investigation of whether it would be consistent with the solutions already adopted in intellectual property law. *Koziol's* proposal, based on the doctrine of allocation of goods and aimed at filling a »gap in protection« between the law of damages and the law of unjust enrichment[75] involves introducing a claim the prerequisite of which is objective negligence. Unlike Austrian patent law, which requires culpable interference in order for the victim to seek disgorgement of profit and makes the »claim for use« independent of the interferer's fault[76], Polish intellectual property law makes the claim for disgorgement of profit dependent on unlawfulness only, while the »claim for use«, which is an alternative to a claim for damages awarded in accordance with the general rules of the Civil Code, either requires fault (art 287 of the Industrial Property Law; the claim for triple the author's fee (art 79 of the Copyright Act), which, however, can hardly be labelled a claim for use due to the punitive elements present), or is independent of fault (the atypical »claim for use«, ie a claim for double the author's fee based on art 79 of the Copyright Act). All in all, the Polish system is not entirely consistent, although with one constant pre-

72 For more on this issue, see *Tischner* in: Targosz/Tischner, Komentarz no 8, and the literature cited therein.
73 *Barta/Markiewicz* in: Barta/Markiewicz, Prawo autorskie, commentary to art 79, no 22.
74 Basic Questions I, no 2/46.
75 Ibidem no 2/33 ff; see also no 3/27 above.
76 Basic Questions I, no 2/38 f.

sent, namely that the claim for disgorgement of profit *solely requires the infringement of a right.* Taking this into account, it would seem unfitting to introduce a general disgorgement of profit claim with stricter requirements, especially as the finding of objective negligence tends in effect to be tantamount to the finding of fault (see no 3/118 f below).

VII. Claims for damages

3/32 In order for damage to be shifted from the victim to another person, valid reasons must be present. Firstly, the other person must have caused the damage or, alternatively, harm must have been caused by a factor within his/her sphere of responsibility. Secondly, other conditions must be fulfilled, such as fault on the part of said person, fault or unlawfulness of conduct on the part of another person for whom he/she is liable, or the existence within the person's sphere of control of a thing or an establishment which is a source of danger for others.

3/33 The primary aim of tort law is to compensate the victim, although a deterrent function of delictual liability is also recognised. The penal notion does play a certain, limited role as well; it must, however, be emphasised that its recognition cannot lead to an award of compensation in excess of the damage suffered.

VIII. Punitive damages

3/34 Punitive damages are not accepted in Poland. Taking into account the fundamental principles underlying Polish private law, it seems highly unlikely that this situation will change. What may be seen as an exception to the general rejection of the idea of such damages is art 79 sec (1)3b of the Copyright Act, according to which the author may claim from the person who culpably infringed his economic rights triple the amount of remuneration due to him/her for the use of his/her work (see no 3/29 above). Criticisms of this regulation have been voiced in the relevant literature[77]. Although, as convincingly argued by *Koziol,* the doubling of the author's fee can be reconciled with the notion of compensation[78], the same cannot be said of its tripling in cases of culpable infringements.

77 *Barta/Markiewicz* in: Barta/Markiewicz, Prawo autorskie, commentary to art 79, no 18.
78 Basic Questions I, no 2/57.

IX. Insurance contract law

3/35 In the case of indemnity insurance, the insured should not receive more than the amount of damage suffered. This is achieved by the means most common nowadays, that is by the victim's claim being transferred to the insurer to the extent of the insurance benefit paid out. If the benefit does not cover the damage in full, the victim's claim for the remaining amount of damage takes priority over the insurer's recourse claim against the tortfeasor (art 828 § 1 KC). As for third-party liability insurance, it is recognised as both promoting the compensatory function of tort law and weakening its deterrent effect, the latter being attenuated primarily through the use of a bonus-malus system.

X. Social security law

3/36 Polish social security law, understood in a broad sense, encompasses social insurance (comprising old-age pension insurance, disability and survivors' pension insurance, sickness insurance and work accident insurance), social assistance, national health insurance, benefits in respect of unemployment and family benefits[79]. As is commonly the case in other countries[80], it does not supersede the law of damages, which means that the two systems exist side by side. When it comes to the interplay between these two fields, two areas of social security law are of importance, namely social insurance and national health insurance. In line with the idea that the victim should not be compensated twice for the same damage, it is accepted that social insurance benefits are in principle set off against the damages due from the tortfeasor[81], and also that health services provided free of charge within the national healthcare system are taken into account while calculating

79 For more information on the structure of the Polish social security system see <http://www.zus.pl/files/social_insurance.pdf>.

80 Basic Questions I, no 2/75.

81 Provided that they serve the purpose of compensation. A pension from the Social Insurance Fund (Cf art 57 f of the Act on Pensions from the Social Insurance Fund [Ustawa o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych], consolidated text: Dz U 2009, no 153, item 1227 with later amendments) is therefore deducted from the annuity due from the tortfeasor pursuant to art 444 § 2 or art 446 § 2 KC (for more on these provisions see no 3/161 f below), whereas a so-called funeral allowance (art 77 of the Act on Pensions from the Social Insurance Fund) is not set off against the compensation awarded in accordance with art 446 § 1 KC (for the wording of this provision see FN 82 below) due to the fact that the function of such allowance is primarily social and not compensatory; see SN judgment of 15.5.2009, III CZP 140/08, Orzecznictwo Sądu Najwyższego (OSN) no 10/2009, item 10 (the reasons for the judgment); see also the commentary on the judgment by *E. Bagińska,* Poland, in: H. Koziol/B.C. Steininger (eds), European Tort Law 2009 (2010) 477 ff.

damages, which means that only such medical expenses are compensated[82] as have not been covered by public health insurance[83]. Notwithstanding the fact that social security benefits are deducted from damages, there is in principle no right of recourse against the liable injuring party on the part of the social security provider. As the Supreme Court (Sąd Najwyższy; SN) observed, the only provision in Polish law that explicitly grants such recourse[84] – very limited in scope – is art 70 of the Act of 25 June 1999 on cash social insurance benefits in respect of sickness and maternity[85], which entitles the Social Insurance Institution (Zakład Ubezpieczeń Społecznych; ZUS) to claim the reimbursement of the *sickness allowance* and the *rehabilitation benefit* from the person who caused the insured's inability to work *through intentional crime or offence.* As was pointed out by the Court, the fact that there are no provisions granting ZUS a right of recourse in other cases must not necessarily mean that this right does not exist; the lack of such provisions might be regarded as a loophole which could be filled by way of analogy[86]. The SN admitted that considerations of justice speak in favour of granting recourse as denying it would mean relieving the person who caused damage of liability merely because the victim received compensation from a third party; in the end, however, it negated the existence of recourse claims with the justification that since the legislator explicitly allows such claims in specific cases it must be inferred that the lack of recourse in other cases is the result of a conscious decision[87]. In a judgment of 15 May 2009[88] the Court pointed out that one cannot be too hasty in affirming the existence of a loophole in social insurance law because what is crucial in this area of law is legal certainty. It emphasised that social insurance relations are regulated precisely and exhaustively, which means that if there is an issue that the legislator has *not* regulated, it must be assumed that it was its intention to do so.

82 Based on arts 444 § 1 and 446 § 1 KC. Pursuant to art 444 § 1 KC, in the case of a bodily injury or a health disorder, damages encompass all costs resulting therefrom. In accordance with art 446 § 1 KC, if the victim dies as a result of a bodily injury or a health disorder, the person obliged to redress damage shall reimburse the costs of treatment as well as funeral expenses to the person by whom they were incurred.

83 SN of 13.12.2007, I CSK 384/07, LEX no 351187; SN of 15.5.2009, III CZP 140/08, OSN no 10/2009, item 132 (see the reasons for the judgment).

84 SN of 8.10.2010, III CZP 35/10, OSN no 2/2011, item 13 (see the reasons for the judgment).

85 Ustawa o świadczeniach pieniężnych z ubezpieczenia społecznego w razie choroby i macierzyństwa, consolidated text Dz U 2010, no 77, item 512 with later amendments.

86 SN of 15.5.2009, III CZP 140/08, OSN no 10/2009, item 10.

87 See SN of 27.4.2001 (III CZP 5/01, OSNC no 11/2001, item 161) where the Court stated that health funds (kasy chorych; the equivalent of German Krankenkassen, which were replaced by the National Health Fund [Narodowy Fundusz Zdrowia; NFZ] – cmt KLR) were not entitled to claim reimbursement of medical expenses from the person who caused damage to the insured.

88 III CZP 140/08, OSNC no 10/2009, item 132.

3/37 The Polish employee compensation scheme, which encompasses benefits regulated in the Act on Social Insurance Coverage in the case of Work Accidents and Professional Diseases of 2002[89], forms part of the social insurance system[90]. The Civil Code provisions on personal injury compensation complement the insurance scheme as far as damage suffered by the employee is not covered by benefits due to him/her in accordance with the scheme[91]. As for damage to property suffered by an employee who had an accident at work, the employer is obliged to redress certain types of losses (damage to personal belongings and items necessary to perform the work, with the exception of motor vehicles and money) pursuant to art 237^1 § 2 of the Labour Code (kodeks pracy, hereinafter: KP)[92]. Other property damage is compensated in accordance with the provisions of the Civil Code[93].

XI. Compensating victims of crime and catastrophes

3/38 In accordance with the Act on State Compensation for Victims of Certain Crimes of 2005[94] (hereinafter: UPK), compensation specified by the Act is awarded in cases when a Polish citizen or a citizen of another EU country dies or suffers serious personal injury as a result of a crime committed in Poland. The compensation, designed to cover loss of earnings or other means of subsistence as well as costs of medical treatment, rehabilitation and funeral costs, is very limited as to amount: it cannot exceed PLN 12,000 (approx € 3,000) (art 6 UPK). It is awarded only provided that and insofar as the claimant is unable to obtain compensation for loss of earnings or other means of subsistence as well as the costs listed above from the perpetrator, an insurer, as social assistance benefits or from any other source. If the State Treasury awards compensation pursuant to the provisions of the UPK,

89 Act of 30.10.2002, consolidated text Dz U 2009, no 167, item 1322 with later amendments.

90 For more on the scheme and its relationship with private law see *D. Dörre-Nowak,* Employers' Liability and Workers' Compensation: Poland, in: K. Oliphant/G. Wagner (eds), Employers' Liability and Workers' Compensation (2012) 369 ff.

91 *J. Jończyk,* Ubezpieczenie wypadkowe, Państwo i Prawo (PiP) no 6/2003, 7; *W. Sanetra,* O założeniach nowego systemu świadczeń z tytułu wypadków przy pracy i chorób zawodowych, Praca i Zabezpieczenie Społeczne no 3/2003, 4; *Ł. Pisarczyk,* Odpowiedzialność pracodawcy za szkodę spowodowaną wypadkiem przy pracy, Studia Iuridica XLVII/2007, 212.

92 Act of 26 June 1974, consolidated text Dz U 2014, item 1502.

93 *Dörre-Nowak* in: Oliphant/Wagner, Employers' Liability 391.

94 Ustawa o państwowej kompensacie przysługującej ofiarom niektórych przestępstw. Act of 6.9.2005, Dz U 2005, no 169, item 1415 with later amendments. For more on the act, see *L. Mazowiecka,* Państwowa kompensata dla ofiar przestępstw (2012).

the entitled person's claim is transferred to the state, and the State Treasury has a right of recourse against the perpetrator (art 14); thus the risk of insolvency of the wrongdoer is transferred to the state.

Importantly, compensation is awarded in accordance with the UPK regardless of whether the crime perpetrator or perpetrators have been identified, charged or convicted. For example, the Act explicitly grants the right to compensation in the case of the accused's death. However, unlike in Austria[95], compensation cannot be awarded when the perpetrator is unaccountable for his actions for reasons of insanity, in the case of self-defence or necessity. This is due to the fact that all these circumstances exclude the criminality of an act and the UPK expressly states that despite the fact that criminal proceedings have been initiated, compensation will not be awarded if the criminality of an act is excluded by statute (art 7 § 2 UPK in conjunction with art 17 § 1 pt 2 of the Code of Criminal Procedure [kodeks postępowania karnego; hereinafter: KPK])[96]. **3/39**

There is no scheme in Poland comparable to that implemented by the Austrian Act on a Fund for Catastrophes[97]; ad-hoc solutions are preferred. This approach definitely raises the problem of equality and the question arises why state relief can only be expected in the case of events that affect a large number of people. **3/40**

XII. Disgorgement claims

As in the Germanic systems, the principle of bilateral justification of legal consequences is present not only in the law of tort, and disgorgement in favour of the state rather than the impoverished party is no stranger to the Polish law of unjust enrichment. According to art 412 KC, the court may order a forfeiture of the subject matter of performance to the benefit of the State Treasury if the performance was made in return for an act prohibited by statute or for an ignoble purpose. It must be noted that the court is not obliged to order the forfeiture and that, unlike a duty to return the advantage in the general provisions on unjust enrichment, the forfeiture may be ordered in cases when the party who gained an advantage is no longer enriched. **3/41**

Like the Germanic codes, the Polish Criminal Code (kodeks karny; KK)[98] also provides for the forfeiture of assets that the perpetrator gained by his/her criminal act (arts 44, 45 KK). The forfeiture will not be ordered if the assets are to be **3/42**

95 See *Koziol's* remarks on § 1 of the Austrian VOG in Basic Questions I, no 2/78.
96 Act of 6.6.1997, Dz U 1997, no 89, item 555 with later amendments.
97 Basic Questions I, no 2/80.
98 Act of 6.6.1997, Dz U 1997, no 88, item 553 with later amendments.

returned to the aggrieved party or to another authorised person. The forfeiture of assets gained by a criminal act is also provided for by the Fiscal Offences Code (kodeks karny skarbowy, hereinafter: KKS)[99] (see, inter alia, art 22 § 2 KKS; art 29 (1) KKS).

XIII. Criminal law

3/43 It is a truism to state that the aims of tort law and those of criminal law are fundamentally different. Although, unlike tort law, criminal law is not *directed* at the compensation of damage suffered, it is no stranger to the notion of restitution, which means that – as *Koziol* puts it – a certain interdependence between the two areas of law can be discerned[100].

3/44 The compensatory function became more significant after the entry into force of the new Criminal Code in 1997, which strengthened the position of the crime victim; this meant that crime stopped being perceived predominantly as a conflict between the perpetrator and society, but also began to be considered a clash between the wrongdoer and the aggrieved party[101]. As indicated by *Zoll* and *Wróbel,* the function of compensation is strongly united with the function of justice and expressed most fully in the context of reparative justice. Viewed from this perspective, the aim of criminal law is to eliminate tension created in society by the commission of a crime; in order to achieve this goal, the perpetrator should redress damage caused by his crime. Criminal law therefore should not only punish the perpetrator, but also lead to the reparation of the harm that he caused[102]. Thus, certain punitive measures are known to it that clearly fulfill a compensatory function; these are: »obowiązek naprawienia szkody lub zadośćuczynienia za doznaną krzywdę« (a duty to redress damage or to compensate for pain and suffering) (art 46 § 1 KK) and »nawiązka« (art 46 § 2 KK), which can be ordered instead of this duty and which is de facto a flat-rate compensation[103]. There has been much debate on whether the duty to redress damage imposed pursuant to art 46 KK should be covered by third-party motor vehicle liability insurance of the perpetrator[104].

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99 Act of 10.9.1999, consolidated text Dz U 2013, item 186 with later amendments.

100 Basic Questions I, no 2/85.

101 *J. Giezek* in: M. Bojarski (ed), Prawo karne materialne. Część ogólna i szczególna (2012) 29.

102 *W. Wróbel/A. Zoll,* Polskie prawo karne (2010) 45 f.

103 *A. Marek,* Prawo karne (2006) 287 f.

104 On this, see *M. Bączyk/B. Janiszewska,* Obowiązkowe ubezpieczenie komunikacyjne a prawnokarny obowiązek naprawienia szkody, Przegląd Sądowy no 10/2006; *Ludwichowska,* Odpowiedzialnośc cywilna 300 ff; SN judgment of 21.12.2006 (III CZP 129/06, Orzecznictwo

The fact that the perpetrator has redressed damage may result in an extraordinary mitigation of punishment (art 60 § 2 (1) KK), and in the law regarding fiscal offences the circumstance that the offender has fully paid his public levies due is a condition for the cancellation of punishability (in the case of offences consisting in the diminishment of public levies due; art 16 § 2 KKS). **3/45**

The interdependence between tort law and criminal law also manifests itself in the fact that unlawfulness as a prerequisite for fault-based liability may consist in the violation of a criminal law provision. **3/46**

Sądu Najwyższego. Izba Cywilna [OSNC] no 10/2007, item 151), where it was held inadmissible for the perpetrator to recover a nawiązka paid by him to the injured party from his liability insurer (for more on the case, see *E. Bagińska,* Poland, in: H. Koziol/B.C. Steininger [eds], European Tort Law 2007 [2008] 459 ff); SN judgment of 13. 7. 2011 (III CZP 31/11, OSNC no 3/2012, item 29), where the Court held that the person liable for a traffic accident on whom a duty to redress damage has been imposed pursuant to art 46 § 1 KK may claim from his liability insurer the return of the payment made to the aggrieved party.

Part 3 The tasks of tort law

3/47 Three principal functions of liability for damage are distinguished in Polish literature: the function of compensation, the function of deterrence and the penalty function[105].

I. Compensatory function

3/48 It is undisputed that the main function of tort law is that of compensation. Polish law adheres to the principle of full restitution, expressed in art 361 § 2 KC, which states that, in the absence of a legal provision or a contractual clause stating otherwise, the redress of damage encompasses losses suffered by the injured party as well as profits that he/she could have obtained had he/she not suffered damage (see also no 3/157 below). Art 363 § 2 KC, pursuant to which the amount of damages is determined in accordance with the prices existing on the date of calculation of compensation[106], as well as the observance of the principle of »compensatio lucri cum damno«, also serve the embodiment of the compensatory function. There are, of course, exceptions to the principle of »restitutio in integrum«; for example, art 440 KC (see no 3/164 below) allows for a reduction of damages in accordance with the circumstances of the case if such a reduction is required by the principles of community life in view of the financial situation of the injured party or of the person liable for damage if both parties are natural persons; arts 114 ff KP reduce the compensatory function of employee's liability towards his employer by making the former liable only for the latter's actual loss as well as by limiting damages to three times the monthly salary (see also no 3/158 below)[107]. The com-

105 See, inter alia, *A. Szpunar,* Uwagi o funkcjach odpowiedzialności odszkodowawczej, PiP no 1/2003, 17 ff; *A. Śmieja,* Z problematyki funkcji odpowiedzialności odszkodowawczej, in: S. Wójcik (ed), Prace cywilistyczne (1990) 327; *T. Pajor,* Przemiany w funkcjach odpowiedzialności cywilnej, in: Rozprawy z polskiego i europejskiego prawa prywatnego. Księga pamiątkowa ofiarowana Profesorowi Józefowi Skąpskiemu (1994) 297.

106 Unless special circumstances (such as, eg, the fact that the injured party repaired the damage earlier by him/herself) require that prices from a different point in time be taken as a basis for the assessment; this rule, expressed in art 363 § 2, also serves the purpose of compensation.

107 Further on the exceptions to the principle of full compensation, see *B. Lewaszkiewicz-Petrykowska,* Zasada pełnego odszkodowania – mity i rzeczywistość, in: L. Ogiegło/W. Popiołek/M. Szpunar (eds), Rozprawy prawnicze: księga pamiątkowa Profesora Maksymiliana Pazdana (2005) 1069 ff.

pensatory function is decisive also in the area of non-pecuniary loss[108]. Several authors claim that this function of non-pecuniary damages also covers the feeling of satisfaction derived by the injured party from the fact that the legal system reacted to the infringement of his/her personality rights[109], and insist that satisfaction on the part of the victim means that the compensatory function is also fulfilled in cases when the latter demands that an appropriate sum of money is awarded for a social purpose[110].

II. Function of deterrence and continuation of a right (Rechtsfortsetzungsfunktion)

The deterrent function of tortious liability[111] is only secondary. The majority of Polish legal writers recognise it in the area of fault-based liability and stress its negligible (or none at all) significance in the field of strict liability[112]. A different view, according to which strict liability also fulfils a preventive function, has, however, also been expressed[113]. **3/49**

As for the notion of the continuation of a right (Rechtsfortsetzungsgedanke), its presence in Polish law may be discerned insofar as the concept of objective-abstract damage assessment is recognised (see no 3/71 f below). **3/50**

108 See, inter alia, *Szpunar,* PiP no 1/2003, 23; *idem,* Zadośćuczynienie za szkodę niemajątkową (1999) 78 ff; *A. Ohanowicz/J. Górski,* Zarys prawa zobowiązań (1970) 67; SN judgment of 8.12.1973, III CZP 37/73, OSNC no 9/1974, item 145; SN judgment of 30.1.2004, I CK 131/03, OSNC no 2/2005, item 40 (for a commentary on the case see *E. Bagińska,* Poland, in: H. Koziol/B.C. Steininger [eds], European Tort Law 2005 [2006] 460 ff).

109 *Szpunar,* PiP no 1/2003, 24; *idem,* Zadośćuczynienie 79; *Śmieja* in: Olejniczak, System Prawa Prywatnego 703.

110 *Szpunar,* PiP no 1/2003, 23; *Śmieja* in: Olejniczak, System Prawa Prywatnego 702 f; *Radwański/Olejniczak,* Zobowiązania 266. According to art 448 KC, in the case of a violation of a personality right (the provision speaks of a violation of »dobra osobiste« on the notion of »dobra osobiste« see FN 31 above), a court may grant to the person whose right has been violated an appropriate sum of money as compensation for non-pecuniary loss or, following the request of the injured party, award an appropriate sum of money for a social purpose indicated by the victim, irrespective of other means required to remove the effects of the violation.

111 Which, as has been emphasised by several authors, is to be understood as special deterrence, and not as general deterrence; see, inter alia, *Szpunar,* PiP no 1/2003, 22.

112 *Kaliński* in: Olejniczak, System Prawa Prywatnego 73; *Szpunar,* PiP no 1/2003, 22. *Śmieja,* on the other hand, underlines that liability fulfils a deterrent function in all cases where the tortfeasor is at fault, regardless of whether fault is a prerequisite of liability: *Śmieja* in: Wójcik (ed), Prace cywilistyczne 331 f.

113 *W. Warkałło,* Odpowiedzialność odszkodowawcza. Funkcje, rodzaje, granice (1972) 211 f.

III. Penalty function

3/51 It is stressed that the diminution of the perpetrator's patrimony connected with his duty to redress damage is supposed to act as a penalty, but the punitive function of tortious liability only fulfils a secondary role[114], and is rejected in the area of strict liability[115]. It is pointed out by several authors, including *Szpunar* – one of the most distinguished Polish private law professors – that the idea of retribution is difficult to reconcile with the principles underlying civil liability for damage. *Szpunar* also emphasises that this difficulty disappears if punitive components do not exist alone, but in conjunction with compensation or prevention[116]. It may therefore be said that penalisation is only accepted in Polish private law as a by-product of compensation or a prerequisite of the deterrent impact of tortious liability[117]. The dependent character of punitive elements is corroborated by the fact that no »true« penalty, ie penalty going beyond the purpose of compensation, can be imposed in tort law[118]. Regardless of the degree of fault, it can never lead to an award of damages in excess of the damage suffered[119]. A punitive function is known to have been attributed to non-pecuniary damages, but – as has already been pointed out – the purpose of such damages is to make good the loss suffered, and not to penalise the perpetrator. If a higher sum of money is awarded when there is serious fault on the part of the tortfeasor, it is not for punitive purposes, but because in such cases non-pecuniary damage tends to be more sizeable[120].

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114 *T. Dybowski* in: Z. Radwański (ed), System Prawa Cywilnego, vol III, Part 1. Prawo zobowiązań – część ogólna (1981) 210.

115 *Kaliński* in: Olejniczak, System Prawa Prywatnego 74. *Kaliński* points out that punitive elements are also admitted when the perpetrator's behaviour is unlawful, but not faulty.

116 *Szpunar,* PiP no 1/2003, 23.

117 *Śmieja* in: Olejniczak, System Prawa Prywatnego 362; *idem* in: Wójcik, Prace cywilistyczne 330.

118 Cf Basic Questions I, no 3/13.

119 Cf *W. Warkałło,* Gradacja winy a obowiązek naprawienia szkody w świetle przepisów kodeksu cywilnego, Studia Prawnicze (SP) no 26-27/1970, 292.

120 See, inter alia, *Kaliński* in: Olejniczak, System Prawa Prywatnego 70. In contrast *Nesterowicz* and *Bagińska* point out that when there is grave fault on the part of the tortfeasor, and especially when his conduct is of a criminal nature, compensation for non-pecuniary loss should also fulfil a punitive function; see *E. Bagińska/M. Nesterowicz,* Poland, in: B. Winiger/H. Koziol/B.A. Koch/R. Zimmermann (eds), Digest of European Tort Law, vol II: Essential Cases on Damage (2011) 594 f (commentary on a medical malpractice case).

Part 4 The area between tort and breach of an obligation

I. Tort, breach of contract and the interim area

Polish law separates tort (arts 415 ff KC) from breaches of contract (arts 471 ff KC). Similarly to German law, no interim area is formally recognised, and unlike it, the prevailing view classifies breaches of pre-contractual duties of care as belonging to the field of tort[121], although at the same time it is acknowledged that culpa in contrahendo[122] may in certain cases consist in an infringement of an existing obligation[123]. At this point a diverging opinion should also be noted, in accordance with which liability for culpa in contrahendo constitutes a special regime, separate from both tortious and contractual liability[124]. **3/52**

The provisions on causation and on the extent as well as methods of compensation (arts 361–363 KC) are common to both tort and contract. The prevailing view is that art 355 KC, which defines due diligence of the debtor, is also applicable to both these fields (see also no 3/117 below). **3/53**

The issues dealt with differently under tort and contract are above all the burden of proof of liability (burden of proof of fault), vicarious liability and prescription as well as compensable damage. **3/54**

In accordance with art 471 KC, a debtor is obliged to redress damage caused by the non-performance or inappropriate performance of an obligation unless the non-performance or inappropriate performance was caused by circumstances for which he/she is not liable. This, in conjunction with art 472 KC, means that the **3/55**

121 See, inter alia, *Radwański/Olejniczak,* Zobowiązania 138; *A. Szpunar,* Odszkodowanie za szkodę majątkową. Szkoda na mieniu i osobie (1998) 49; SN judgment (panel of 7 judges) of 28. 9. 1990, III CZP 33/90, OSNC no 1/1991, item 3.

122 The basic Civil Code provision dealing with culpa in contrahendo is art 72 § 2 KC, which states that the party who initiated or conducted negotiations contra bonos mores, and in particular with no intention of concluding the contract, is obliged to redress the damage that the other party sustained due to the fact that he/she relied on the conclusion of the contract.

123 See *Radwański/Olejniczak,* Zobowiązania 139, who give the example of a violation of a framework agreement. The existence of an obligation is also acknowledged in the case of art 72[1] KC, which deals with the infringement of a duty not to disclose confidential information or turn it over to third parties; see, inter alia, *Radwański/Olejniczak,* Zobowiązania 139; *M. Krajewski* in: E. Łętowska (ed), System Prawa Prywatnego, vol V. Prawo zobowiązań – część ogólna (2006) 721.

124 *P. Sobolewski,* Culpa in contrahendo – odpowiedzialność deliktowa czy kontraktowa? Przegląd Prawa Handlowego no 4/2005, 28; *D. Zawistowski,* Wina w kontraktowaniu (culpa in contrahendo) na tle zmian w kodeksie cywilnym, Acta Universitatis Wratislaviensis, Prawo CCLXXXIX (2004) 287.

debtor will in principle not be liable if it is demonstrated that he/she exercised due diligence[125]. The burden of proof is therefore reversed in comparison to tort, where the victim needs to prove all the prerequisites of liability, including the tortfeasor's fault[126].

3/56 In contract the principal bears comprehensive liability for the acts of auxiliaries that he/she entrusts with the performance of his/her obligations (see no 3/122)[127]. In tort, liability for auxiliaries is either based on presumed culpa in eligendo (art 429 KC) or is strict, but dependent on the auxiliary's fault (art 430 KC; see no 3/123 ff). All in all, liability for auxiliaries is stricter in contract than it is in tort.

3/57 Limitation periods in contract are generally shorter than in tort (on prescription in tort see chapter 9).

3/58 Although the Civil Code does not contain the equivalent of art 157 § 3 in its predecessor – the Code of Obligations (kodeks zobowiązań; KZ)[128], the traditional and still prevailing view is that non-pecuniary damages may only be awarded in cases expressly provided for by statute, thus only in the field of tortious liability[129]. This view finds support in the systematics of the Civil Code, since the provisions on compensation for non-pecuniary loss (see no 3/64) are situated in the code section dealing with torts. It follows from the above that an award of non-pecuniary damages in the case of non-performance or inappropriate performance of an obligation is only possible if such non-performance/inappropriate performance is at the same time a tort[130]; this, as well as longer limitation periods in the case of delictual liability, has resulted in the courts' relative proneness to assume that it is indeed the case. This tendency has been subject to criticism, with the critics labelling it as excessive and emphasising the obvious: that a tort is only committed if there is a violation of duties that must be observed by everybody, which can be committed by anyone, irrespective of whether they remain in a contractual

125 Pursuant to art 472 KC, if nothing else is stipulated by statute or by a legal act, the debtor is liable for the failure to apply due diligence.

126 There are exceptions to this rule as liability may be based on presumed fault (eg art 427 KC).

127 Art 474 KC states that he/she is liable for their acts and omissions as for his/her own.

128 Regulation of 27.10.1933, Dz U no 82/1933, item 598. Pursuant to art 157 § 3 KZ, in cases stipulated by statute the injured party could claim, irrespective of compensation for pecuniary damage, damages for moral harm.

129 See, inter alia, *A. Szpunar,* Ustalenie odszkodowania w prawie cywilnym (1975) 87; *idem,* Zadośćuczynienie 74; *M. Nesterowicz/E. Bagińska,* Non-Pecuniary Loss under Polish Law, in: W.V. Horton Rogers (ed), Damages for Non-Pecuniary Loss in a Comparative Perspective (2001) 173. An important exception is compensation for the loss of enjoyment of a holiday, the admissibility of which has been forced by EU case law (see no 3/69 below).

130 See, inter alia, SN judgment of 25.2.1986, III CZP 2/86, OSNC no 1/1987, item 10; cf the remarks on concurrent claims (no 3/59 below).

relationship with the injured party[131]. At the same time, it is being brought up in the relevant literature that the law should be changed and that damages for non-pecuniary loss should not be restricted to tortious liability[132]. These proposals are mirrored in the results of the work conducted within the Commission for the Codification of Private Law, which is preparing a draft of the new Civil Code. The Commission made plans to allow for an award of damages for non-pecuniary loss caused by the non-performance or improper performance of an obligation provided that such an award is justified by the nature of the obligation, in that such aims to satisfy a non-pecuniary interest of the creditor[133]. Several authors are of the opinion that non-pecuniary damages may be awarded within the contractual regime de lege lata if a non-performance or inappropriate performance of an obligation has led to bodily injury or a health disorder, ie in cases of violation of personality rights indicated in art 445 KC (see no 3/64 below)[134]. A further reaching view has also been expressed, according to which arts 445 and 448 KC[135] can be applied mutatis mutandis in the field of contractual liability, entailing the possibility to award non-pecuniary damages in contract in cases of infringement of all personality rights[136]. It is worth noting that art 242 KZ expressly stated that tortious provisions on damage compensation are applicable mutatis mutandis to contracts, which de facto made it possible to establish liability in contract and at the same time award damages for non-pecuniary loss[137]; the Civil Code does not, however, contain the equivalent of art 242 KZ.

131 See, inter alia, *W. Robaczyński/P. Księżak,* Niewykonanie lub nienależyte wykonanie zobowiązania jako czyn niedozwolony, in: M. Nesterowicz (ed), Czyny niedozwolone w prawie polskim i prawie porównawczym (2012) 334 ff.

132 See, inter alia, *M. Nesterowicz,* Zadośćuczynienie pieniężne in contractu i przy zbiegu z odpowiedzialnością ex delicto, PiP no 1/2007, 30 f.

133 See grounds for the SN judgment of 19.11.2010, III CZP 79/10, OSNC no 4/2011, item 41.

134 See, inter alia, *Robaczyński/Księżak* in: Nesterowicz, Czyny niedozwolone 339. Courts are known to have adopted this solution and awarded non-pecuniary damages in the case of a breach of a holiday contract – for more on this, see *M. Nesterowicz,* Odpowiedzialność kontraktowa i deliktowa (uwagi de lege ferenda i o stosowaniu prawa), PiP no 1/1999, 22.

135 For the wording of art 448 KC see FN 110 above.

136 *M. Safjan,* Naprawienie krzywdy niemajątkowej w ramach odpowiedzialności ex contractu, in: M. Pyziak-Szafnicka (ed), Odpowiedzialność cywilna. Księga pamiątkowa ku czci Profesora Adama Szpunara (2004) 275 f; on this also *E. Łętowska,* Zbieg norm w prawie cywilnym (2002) 94.

137 See, inter alia, SN judgment of 6.7.1966, I CR 134/64, Orzecznictwo Sądów Polskich i Komisji Arbitrażowych (OSPiKA) no 7-8/1967, item 183.

II. The problem of concurrent claims

3/59 Contractual and tortious claims are deemed to exist independently of one another in Polish law. In accordance with art 443 KC, »the fact that the act or omission from which the damage arose constituted the non-performance or the improper performance of a pre-existing obligation does not preclude a claim for damages in tort, unless the pre-existing obligation provides otherwise«[138]. It is assumed that this provision entitles the injured party to choose a liability regime, and the prevailing view is that the two regimes cannot be »mixed«[139]. In other words, it is either tort or contract, with all the consequences of the choice made. In this context, *Łętowska* points out that while it is unacceptable to create a »hybrid claim« based on mixed contractual and delictual prerequisites, one needs to be more cautious when negating the possibility to complement a contractual claim for damages with a claim for compensation of pecuniary or non-pecuniary loss[140]. It must also be noted that, according to *Ohanowicz,* it is possible to accumulate claims that do not overlap, hence for instance a victim who opts for the contractual regime may at the same time be entitled to compensation for non-pecuniary damage provided that the prerequisites for tortious liability for such damage are fulfilled[141]. Polish courts are known to have failed to comply with the requirement of »regime purity« in travel law cases[142]. For instance, in a case decided in March 1968, the Supreme Court found a Polish tour operator liable for the conduct of the Bulgarian health service, whose negligence led to the death of one of the holidaymakers, based on the provisions on contractual liability for auxiliaries[143] and at the same time awarded to the next of kin of the deceased an annuity as well as compensation for a considerable deterioration of their standard of living based on the provisions on tortious liability[144].

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138 Translation by *Bagińska* in: Oliphant/Steininger, Basic Texts 197.

139 See, inter alia, *W. Czachórski,* Odpowiedzialność deliktowa i jej stosunek do odpowiedzialności kontraktowej wg k.c., Nowe Prawo (NP) no 10/1964, 958; *Radwański/Olejniczak,* Zobowiązania 389; *Śmieja* in: Olejniczak, System Prawa Prywatnego 659; *E. Bagińska,* Poland, in: H. Koziol/B.C. Steininger (eds), European Tort Law 2006 (2008) 383; SN judgment of 26.9.2003, IV CK 8/02, OSNC no 11/2004, item 180 (for a commentary on the judgment see *E. Bagińska,* Poland, in: H. Koziol/B.C. Steininger [eds], European Tort Law 2004 [2005] 470 ff).

140 *Łętowska,* Zbieg norm 96.

141 *A. Ohanowicz,* Zbieg norm w polskim prawie cywilnym (1963) 114.

142 For more on this issue *Nesterowicz,* PiP no 1/1999, 22 f.

143 Assuming the tour operator's contractual liability for auxiliaries made it impossible for him to free himself from liability on the grounds that the performance was entrusted to a professional, which he might have done had the court taken art 429 KC, establishing delictual liability for auxiliaries, as a basis for his responsibility.

144 SN of 28.3.1968, I CR 64/68, Przegląd Ustawodawstwa Gospodarczego (PUG) no 4/1969, 137.

3/60 It follows from the above that Polish law is not familiar with the concept of a uniform basis for a claim for damages[145]. Although the idea of creating overall liability rules combining the principles of tortious and contractual liability and designed especially for particular interim cases or for situations where a breach of contract is at the same time a tort[146] is very sensible and commendable given the solution's flexibility and adaptability to specific cases, it is hard to imagine it finding support in Poland, at least in the foreseeable future. The attachment to the traditional dualism of regimes and »hard and fast rules« rather than flexible solutions is strong. Using *Koziol's* words[147], one can speak of a »denial of the interim area«, which means that each situation is allocated either to the field of contract, or to the realm of tort (or to both with a right to choose the regime; see no 3/59 above), but not »in between« (see no 3/52 above). This has, for instance, led – as indicated above – to the classification of breaches of pre-contractual duties of care (culpa in contrahendo) as torts[148]. As already noted, the »mixing and matching« of regimes in cases of breaches of contract that are at the same time torts is deemed inadmissible. Rather than accept it, scholars prefer to put forward changes in law or re-interpret the law in force, and eg postulate the introduction of non-pecuniary damages also in the field of contractual liability. The adherence to the dichotomy of liability regimes was recently questioned, but the proposal to divert from it has not found wider resonance; also, the said proposal does not involve developing combinations of rules based on the intensity of the relationship between the perpetrator and the victim, but an introduction of a monistic regime with sets of special provisions regulating liability differently, such different regulation being justified either by the characteristics of the perpetrator, or by the circumstances of damage infliction[149].

145 Basic Questions I, no 4/19.
146 Basic Questions I, no 4/18 ff.
147 Basic Questions I, no 4/3.
148 See no 3/52 above.
149 *J.M. Kondek,* Jedność czy wielość reżimów odpowiedzialności odszkodowawczej w prawie polskim – przyczynek do dyskusji de lege ferenda, in: Studia Iuridica XLVII/2007, 161 ff.

Part 5 The basic criteria for a compensation claim

I. Damage

A. Introduction

3/61 Like the vast majority of legal systems, Polish law does not define the term »damage«. It has been argued that such a definition was not needed as damage was sufficiently well defined in everyday language[150]. It does, however, go without saying that a *natural* definition of damage is not sufficient for the purposes of the law of damages, where not every type of loss that has been suffered matters, but only such as is deemed recoverable[151]. It is also pointed out that damage has more than one meaning in everyday language[152], whereas legal language requires precision. Legal doctrine usually defines (recoverable) damage as harm to legally protected rights or interests[153]. A component often added to the definition is that damage is harm suffered by a person *against their will*[154]*;* this element is, however, disputed[155].

3/62 As far as the special problem of damage to the environment as a common good is concerned[156], the concept as such is recognised. When unlawful conduct poses threat of such damage or where damage has already been caused, the State Treasury, a local government unit or an ecological organisation may demand that the lawful position is restored as well as preventive measures undertaken by the liable person[157].

150 *Czachórski,* Prawo zobowiązań 118; *Dybowski* in: Radwański, System Prawa Cywilnego 213; *Ohanowicz/Górski,* Zarys 46.

151 See, inter alia, *Dybowski* in: Radwański, System Prawa Cywilnego 214 f.

152 *Kaliński* in: Olejniczak, System Prawa Prywatnego 77.

153 *Radwański/Olejniczak,* Zobowiązania 90; *Szpunar,* Ustalenie odszkodowania 41; *Dybowski* in: Radwański, System Prawa Cywilnego 226.

154 See, inter alia, *Szpunar,* Ustalenie odszkodowania 36; *Radwański/Olejniczak,* Zobowiązania 90.

155 *Banaszczyk* in: Pietrzykowski, Kodeks cywilny 1338; *Dybowski* in: Radwański, System Prawa Cywilnego 216. SN judgment of 25.1.2007, V CSK 423/06, LEX no 277311.

156 See Basic Questions I, no 5/5.

157 See art 323 sec 2 of the Environmental Protection Law (Prawo ochrony środowiska. Act of 27.4.2001, consolidated text Dz U no 25/2008, item 150 with later amendments). More on this issue: *Bagińska/Nesterowicz* in: Winiger/Koziol/Koch/Zimmermann, Digest II 54.

B. Pecuniary and non-pecuniary damage

1. In general

3/63 Depending on which interests are infringed, either pecuniary or non-pecuniary loss is suffered by the victim, the former described as harm affecting assets that have a pecuniary value[158], and the latter defined as an infringement not reflected in the injured party's patrimony[159]. A minority view regards non-pecuniary loss as a concept separate from the notion of damage, to which the provisions on damage may only be applied mutatis mutandis; from this perspective, damage means only pecuniary loss[160]. In accordance, however, with the view dominant in the jurisprudence and in the relevant literature, both pecuniary and non-pecuniary losses are subcategories of damage[161].

2. The special nature of non-pecuniary damage

3/64 As has already been indicated[162], Polish law falls into the group of legal systems that are restrictive when it comes to granting damages for non-pecuniary loss. The Civil Code only allows for the award of such damages when the victim suffered bodily injury or a health disorder (irrespective of whether liability is fault-based or strict) (art 445 KC), in the case of a culpable infringement of a personality right (art 448 in conjunction with art 24 § 1 KC) and in the case of death of a »closest family member« (bereavement damages; art 446 § 4 KC). An award of non-pecuniary damages remains at the court's discretion, ie it is not compulsory. It is, however, widely acknowledged that »discretion« is not tantamount to complete freedom and that compensation may only be denied on the basis of objectively verifiable criteria[163]. A refusal is justified if such criteria indicate that no non-pecuniary damage has been inflicted or that the loss suffered is trivial (insignificant)[164].

3/65 As *Koziol* emphasises, since it is intrinsically difficult to assess whether and to what extent a person has sustained non-pecuniary damage, recourse is had to objective indicators which help in such assessment[165]. This idea is present also in Polish law. *Safjan* points out that in evaluating the extent of suffering and nega-

158 See, inter alia, *Dybowski* in: Radwański, System Prawa Cywilnego 227.
159 SN judgment of 6.5.1977, II CR 150/77, LEX no 7936; *Szpunar,* Ustalenie odszkodowania 27.
160 For more on this, see *Dybowski* in: Radwański, System Prawa Cywilnego 222 ff.
161 *Szpunar,* Odszkodowanie za szkodę majątkową 25 ff; *Z. Radwański,* Zadośćuczynienie pieniężne za szkodę niemajątkową. Rozwój i funkcja społeczna (1956) 3 and 166; *Radwański/Olejniczak,* Zobowiązania 92; *Safjan* in: Pietrzykowski, Kodeks cywilny 1732.
162 See no 3/58 above.
163 *Szpunar,* Zadośćuczynienie 81 f; *Nesterowicz/Bagińska* in: Rogers, Damages for Non-Pecuniary Loss 173.
164 See, inter alia, *Safjan* in: Pietrzykowski, Kodeks cywilny 1733.
165 Basic Questions I, no 5/14 and the literature cited therein.

tive feelings, objective criteria should be applied, which, however, need to be related to the circumstances of each case[166]. Several authors accentuate the need to award similar sums in similar cases, which would help avoid jurisprudential disparities and ensure greater predictability of case law concerning non-pecuniary loss[167], but the Supreme Court, which stresses the individual character of moral harm, is quite cautious when approaching the subject. It treats sums awarded in similar cases as »indicatory guidelines«[168] and is not entirely consistent as to how much weight it ascribes to them. On the one hand, it regards referring to comparable cases as useful (albeit to a limited extent due to the subjective character of non-pecuniary loss)[169], and on the other states that sums awarded in similar cases cannot be regarded as an additional criterion justifying the reduction of damages, and also that it is impossible to measure whether non-pecuniary damage in a given case is smaller or greater than the loss suffered by another person, even if the latter suffered similar injuries and is in a comparable life situation[170]. There are no tables reporting the amounts of non-pecuniary damages granted by Polish courts[171] which – if need be – could facilitate referring to other cases.

3. Non-pecuniary harm to legal entities

3/66 There is no unanimity in Polish literature as to whether legal entities may sustain non-pecuniary harm and consequently be awarded non-pecuniary damages. The only provision that could possibly enable such an award is art 448 KC, as both art 445 KC and art 446 § 4 KC by their nature apply only to natural persons. Several authors claim that since legal entities are incapable of mental suffering, there is no non-pecuniary damage that can be compensated[172]. Others are of the opinion that art 448 may be applied also in cases of violations of legal entities' personality rights[173] and emphasise that the non-pecuniary interests of such entities, such as good reputation, should be protected to the same extent as those of natural persons[174]. The latter view finds support in the jurisprudence of the Supreme Court[175].

166 *Safjan* in: Pietrzykowski, Kodeks cywilny 1736 f.
167 See, inter alia, *Szpunar,* Zadośćuczynienie 186; *K. Ludwichowska,* Note on SN judgment of 14.2.2008 (II CSK 536/07), OSP no 5/2010, item 47.
168 See, inter alia, SN judgment of 30.1.2004, I CK 131/03, OSNC no 2/2005, item 40 (for a commentary on the judgment see *Bagińska* in: Koziol/Steininger, European Tort Law 2005, 460 ff).
169 SN judgment of 30.1.2004, I CK 131/03.
170 SN judgment of 14.2.2008, II CSK 536/07, OSP no 5/2010, item 47; critically on this last issue, *K. Ludwichowska,* Note on SN judgment of 14.2.2008 (II CSK 536/07), OSP no 5/2010, item 47.
171 *Bagińska* in: Koziol/Steininger, European Tort Law 2005, 463.
172 *J. Jastrzębski,* Kilka uwag o naprawieniu szkody niemajątkowej, Palestra no 3-4/2005, 42 f; *Śmieja* in: Olejniczak, System Prawa Prywatnego 700 f.
173 *Safjan* in: Pietrzykowski, Kodeks cywilny 1761; *Radwański/Olejniczak,* Zobowiązania 264.
174 *Radwański/Olejniczak,* Zobowiązania 264.
175 SN of 15.12.1975, I CR 887/75, LEX no 77/80; SN of 24.9.2008, II CSK 126/08, OSNC no 2/2009, item 58.

In a judgment of 11 January 2007[176], the Court expressly stated that the personality rights of a legal entity »should not be linked exclusively with its organs or with the natural persons creating the legal person« since »the essence of a legal entity lies in its separate legal existence« and that »a legal person has a right to have its reputation and good will protected«[177].

4. The problem of loss of use

Not a lot of attention has been paid to the issue of loss of use in Poland, with the vast majority of discussions focusing on the use of motor vehicles. Doctrinal and jurisprudential doubts as to the issue of compensability of the cost of hire of a replacement vehicle have recently been settled by the Supreme Court, which decided that »expedient and economically justifiable« costs of hire need to be compensated even when an accident-damaged car was not used for professional or business purposes[178]. As for »pure« loss of use of an object, there is no unanimity in the Polish doctrine. *Szpunar* claims that if the injured party has not incurred the cost of hire of a replacement, then he/she has not suffered pecuniary damage[179], which in effect means that no compensation should be awarded. His view is shared, inter alia, by *Kaliński,* who points out that in order for pecuniary damage to exist it must be possible to demonstrate it in accordance with the theory of difference, and notes the difficulties that present themselves when establishing the »use value« of certain assets in isolation from the injured party's subjective feelings[180]. *Dybowski,* on the other hand, offers arguments supporting the view that pecuniary damage is suffered by the injured party irrespective of whether a replacement was hired or not, since in both cases a lost »use value« is at stake; the value must, however, be »real«, so for instance no damage will be suffered if the injured party cannot use the object anyway due to his/her stay abroad. Even if the object in question was used for private purposes, the injured party's harm is not solely an »inconvenience« since it consists in the loss of possibility to use an asset that has a certain pecuniary value; the aim of such an object is to meet socially important needs of the victim (in the fields of culture, leisure, tourism) and while the needs themselves cannot be »converted« into money, the value of use of the object

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176 II CSK 392/06, OSP 5/2009, item 55.

177 See *Bagińska/Nesterowicz* in: Winiger/Koziol/Koch/Zimmermann, Digest II 1028 f; *Bagińska* in: Koziol/Steininger, European Tort Law 2009, 494.

178 SN judgment (panel of 7 judges) of 17.11.2011, III CZP 5/11, OSNC 3/2012, item 28. The compensability of costs of hire of a replacement when the damaged car was used for business activities was not questioned, hence the judgment, issued in response to a query by the Insurance Ombudsman (Rzecznik Ubezpieczonych), dealt only with cars used for private purposes.

179 *A. Szpunar,* Utrata możliwości korzystania z rzeczy, Rejent no 10/1998, 11.

180 *M. Kaliński,* Szkoda na mieniu i jej naprawienie (2008) 321.

satisfying them over a period of time can[181]. This can be countered, along with *Larenz* and *Koziol,* with the argument that the owner's right of use is but one aspect of ownership, which is already included in its assessment. Pecuniary damage following the loss of use is, therefore, already incorporated in the loss of value of an object and must not be compensated again[182].

3/68 If one adopts the convincing view that the owner's right to use is not a separate asset but just one of the aspects of ownership, then one must come to the conclusion that what is left for reparation is non-pecuniary damage consisting in the loss of convenience caused by the deprivation of the possibility to use[183]. Such non-pecuniary harm is de lege lata not recoverable under Polish law. Notwithstanding this, the proposal to compensate non-pecuniary losses which are relatively easily assessed to the same extent as pecuniary damage is certainly worth considering de lege ferenda. As *Koziol* points out, the loss of convenience fulfils the said criterion, since the needs met by the damaged object can be satisfied through the use of another object against payment and the expenditure necessary to procure such may serve as an indicator[184]. Whether the proposal has a chance to succeed in Poland is another matter, especially in view of the fact that damages for non-pecuniary loss are firmly rejected in the field of damage to property.

3/69 Like in Germany, awarding damages for the mere loss of enjoyment or leisure time is a circumvention of the law[185] in Poland. Nevertheless, the Supreme Court, acting in line with the European Union case law, or, more precisely, with the *Leitner* case[186], allowed for the award of compensation for the loss of enjoyment of a holiday trip[187]. The Court stated that such a loss constitutes non-pecuniary damage and held that it should be compensated based on art 11a of the Tourist Services Act of 1997[188] (hereinafter: TSA), which regulates contractual liability of a tour operator. According to the Supreme Court, since art 11a TSA is an implementation of art 5 of the Package Tours Directive[189], it should be interpreted in the same way, which means that damage within its meaning should be understood broadly, as encompassing both pecuniary and non-pecuniary loss.

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181 *Dybowski* in: Radwański, System Prawa Cywilnego 233 f.
182 Basic Questions I, no 5/24 and the literature cited in FN 45.
183 Basic Questions I, no 5/25.
184 Basic Questions I, no 5/25.
185 Basic Questions I, no 5/27.
186 *Simone Leitner v. TUI Deutschland GmbH,* Case C-168/00 [2002] European Court Reports (ECR) I-2631.
187 SN judgment of 19.11.2010, III CZP 79/10, OSNC no 4/2011, item 41.
188 Ustawa o usługach turystycznych. Act of 29.8.1997, consolidated text Dz U 2014, item 196.
189 Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, Official Journal (OJ) L 158, 23.6.1990, 59–64.

C. Real and calculable damage

3/70 As for real versus calculable damage, there are diverging opinions in Polish literature. Several authors claim that the mere breach of goods already qualifies as damage[190], while others express the view that one can only speak of damage when referring to the consequences of such a breach[191].

3/71 It is subjective-concrete damage that is compensated under Polish law[192]. In the course of damage assessment, one needs to take into account the overall situation of the injured party and not the state of a particular asset that has been damaged; the recoverable harm is calculated based on the victim's individual position and all the circumstances of the case in question[193]. The theory of difference is accepted both in the jurisprudence and in the relevant literature, with the Supreme Court defining damage as the difference between the state of assets that the injured party would have had at his/her disposal had it not been for the damaging event, and the state of his/her assets after this event[194]. To be precise, what is subject to comparison is the actual state of the victim's assets and their hypothetical state, ie the state that these assets would have been in had it not been for the damaging event[195]. The concept of objective damage is also recognised, the objective method being regarded by many as a starting point in the course of damage assessment, which allows the determination of the minimum amount of compensable damage[196]. Also, objective-abstract assessment is in fact used when calculating compensation for the loss of commercial value: as the Supreme Court pointed out in one of its judgments dealing with this problem[197], »the value of a car after

190 Cf inter alia *Dybowski* in: Radwański, System Prawa Cywilnego 226; *Szpunar,* Ustalenie odszkodowania 41.

191 See, inter alia, *J. Panowicz-Lipska,* Majątkowa ochrona dóbr osobistych (1975) 34, 37; *Radwański,* Zadośćuczynienie pieniężne za szkodę niemajątkową 173.

192 Art 160 KZ gave priority to the objective method of assessing damage. It stated that pecuniary damage is to be determined based on the market value of a thing and that the special value that the thing posed for the injured party was to be taken into account only in cases of intent or gross negligence of the perpetrator. The Civil Code contains no equivalent of this provision.

193 See, inter alia, *Szpunar,* Odszkodowanie za szkodę majątkową 59; *Dybowski* in: Radwański, System Prawa Cywilnego 273.

194 See, inter alia, SN judgment of 11.7.1957, 2 CR 304/57, OSN 1958, item 76; SN judgment of 22.11.1963, III PO 31/63, Orzecznictwo Sądu Najwyższego. Izba Cywilna oraz Izba Pracy i Ubezpieczeń Społecznych (OSNCP) no 7-8/1964, item 128; SN (panel of 7 judges) 12.7.1968, III PZP 28/68.

195 *Radwański/Olejniczak,* Zobowiązania 93.

196 *Szpunar,* Ustalenie odszkodowania 68; *Ohanowicz/Górski,* Zarys 47; *Dybowski* in: Radwański, System Prawa Cywilnego 273; *Banaszczyk* in: Pietrzykowski, Kodeks cywilny 1341. This point of view is questioned by *Jastrzębski,* who holds that the notion of »objective damage« is a concept qualitatively different from that of »subjective damage«, which is why »objective damage« cannot be regarded as a minimum amount that must be compensated *(J. Jastrzębski,* O wyprzedzającej przyczynowości, Kwartalnik Prawa Prywatnego [KPP] no 3/2003, 628–630).

197 SN judgment of 12.10.2001, III CZP 57/01, OSNC no 5/2002, item 57. For more on the case, see *Bagińska/Nesterowicz* in: Winiger/Koziol/Koch/Zimmermann, Digest II 102.

repair is (...) its *market value.* (emphasis KLR) Since this value (...) has decreased in comparison to the market value that the car would have had it not been damaged, compensation should encompass not only the costs of repair, but also the difference in value«[198]. The loss of commercial value of a car is therefore measured by its value on the market and considered compensable irrespective of whether it has manifested itself in the car's sale. This – as pointed out by *Koziol*[199] – is a clear sign of objective-abstract assessment.

3/72 Finally, it needs to be mentioned that several provisions of Polish private law, eg those dealing with carriers' liability, explicitly restrict compensation to objective damage, thus establishing exceptions from the principle of full compensation[200]. The objective method of assessing damage may also be applied based on contractual stipulations.

3/73 Although the theory of difference is traditionally associated with pecuniary damage, *Kaliński* points out that it applies to non-pecuniary loss as well, except that rather than compare the state of the victim's patrimony before the damaging event and as a result of this event, one needs to capture the difference between his/her emotional state at these two points in time[201].

D. Positive damage and loss of profits

3/74 The Civil Code distinguishes between damnum emergens and lucrum cessans, but – as in German law – the distinction does not in principle have any greater significance since pursuant to art 361 § 2 KC, the redress of damage encompasses both losses actually suffered and profits that the injured party could have obtained if damage had not been inflicted. Exceptions to this rule may, however, be introduced by a statutory provision or by a contractual clause. De lege lata the most important of the former is art 438 KC[202], which states that »A person who acts out of duty or even voluntarily to avert the risk of damage to another or to avert a common danger, and suffers pecuniary loss, may demand redress for the *loss sustained* from the persons who benefited thereby in appropriate ratios«[203] (emphasis KLR). Art 438 KC also deserves special mention because the extent of compensation depends not only on the size of the loss sustained by the injured party, but also on the extent of benefits derived by the other persons[204].

198 For more on this, *K. Ludwichowska-Redo,* Odszkodowanie za ubytek wartości handlowej pojazdu po wypadku komunikacyjnym (na tle prawnoporównawczym), PiP no 11/2012 106 f.
199 Basic Questions I, no 3/10 and the literature cited therein.
200 More on this, inter alia, *Szpunar,* Ustalenie odszkodowania 67 ff.
201 *Kaliński* in: Olejniczak, System Prawa Prywatnego 92.
202 See *Bagińska/Nesterowicz* in: Winiger/Koziol/Koch/Zimmermann, Digest II 330.
203 Translation by *Bagińska* in: Oliphant/Steininger, Basic Texts 196.
204 *Safjan* in: Pietrzykowski, Kodeks cywilny 1692.

E. Damage in the case of unwanted birth?

3/75 Although legal problems associated with unwanted birth have been present in Polish case law for a relatively short time[205], several important issues have been addressed by our courts. Like in other legal systems, it has been acknowledged in Poland that harm connected with unwanted conception and/or birth cannot be associated with the child itself[206]. The Supreme Court has repeatedly stated that the birth of a child, including one affected with a genetic defect, cannot in any event be regarded as damage[207]. What have to date been considered compensable harm are additional expenses connected with pregnancy and childbirth as well as the loss of income by the mother in consequence of these events[208]. The issue of maintenance costs has also been addressed, with the Supreme Court stating that recoverable damage encompasses *increased costs of supporting a handicapped child*[209] (in cases where the parents' right to plan a family and to have the pregnancy terminated was violated by a doctor's faulty conduct)[210] as well as the *costs of maintenance of a healthy child to the extent that the child's mother is unable to meet the child's legitimate needs* (in a case where a raped woman delivered a healthy child following an unlawful refusal of an abortion)[211]. In the case concerning a child conceived through rape, the Court stated that it is a rare example of a situation where unlawful actions result in a consequence which is both positive and recognised as valuable in society (the birth of a child), but at the same time distinctly separated this positive consequence from damage consisting in the costs of maintenance that the mother was forced to incur. Interestingly though, and notwithstanding this argumentation, it did not order compensation of these costs in full, but only »to the extent that the mother was unable to meet the child's legitimate

205 The first »typical« wrongful conception case was decided by the Supreme Court in November 2003, and the first wrongful birth judgment was issued in October 2005 (see below).

206 *Radwański/Olejniczak,* Zobowiązania 274.

207 SN of 13.10.2005, IV CK 161/05, OSP no 6/2006, item 71 (for more on the case, see *Bagińska/Nesterowicz* in: Winiger/Koziol/Koch/Zimmermann, Digest II 926 f; *Bagińska* in: Koziol/Steininger, European Tort Law 2006, 384 ff); SN of 22.2.2006, III CZP 8/06, OSNC no 7-8/2006, item 123 (for more on the case, which was first decided on 21.11.2003, see *Bagińska/Nesterowicz* in: Winiger/Koziol/Koch/Zimmermann, Digest II 927 ff; *Bagińska* in: Koziol/Steininger, European Tort Law 2006, 386 ff).

208 SN of 21.11.2003, V CK16/03, OSNC no 6/2004, item 104.

209 Critically on this solution, *T. Justyński,* Rozwój orzecznictwa sądów polskich w sprawach wrongful conception, wrongful birth oraz wrongful life, in: M. Nesterowicz (ed), Czyny niedozwolone w prawie polskim i prawie porównawczym (2012) 214, who states that the only point of reference for the court assessing damage in line with the theory of difference can be the non-existence of a child, and not the existence of a healthy child, as was held by the SN in its decision of 13.10.2005. This is because had the doctor acted lawfully, the child would not have been born.

210 SN of 13.10.2005, IV CK 161/05, OSP no 6/2006, item 71; SN of 6.5.2010, II CSK 580/09, LEX no 602234.

211 SN of 22.2.2006, III CZP 8/06, OSNC no 7-8/2006, item 123.

needs«. This limitation, which seems to indicate, although it was not expressly stated, that the Court thought it appropriate to make an overall assessment of the situation and set off non-pecuniary advantages (birth of a child and (possibly) creation of a family relationship) against pecuniary disadvantages, and which corresponds with the mediatory solution advocated by the Austrian Supreme Court (OGH)[212], has been questioned in the relevant literature[213].

3/76 With regard to the issue of non-pecuniary damage caused by the frustration of family planning, the Supreme Court stated in its decision of 21 November 2003[214] that forcing the claimant to give birth to a baby conceived through rape constitutes an infringement of »broadly understood liberty, encompassing the right to decide about one's personal life«, and later held on several occasions that the right to plan a family, of which the right to a lawful abortion is a consequence, constitutes a personality right, the violation of which justifies an award of compensation for non-pecuniary loss based on art 448 KC in conjunction with art 24 § 1 KC[215]. In a judgment of 12 June 2008[216] the Court ruled that the doctors' refusal to refer a pregnant woman to prenatal testing when it was probable that the foetus was affected with a genetic defect as well as their failure to provide full information about this situation violated the woman's right to plan a family and to make an informed decision to either have a handicapped child or to terminate the pregnancy, which meant that she was entitled to compensation for non-pecuniary loss.

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212 Basic Questions I, no 5/41 ff.

213 *Bagińska/Nesterowicz* in: Winiger/Koziol/Koch/Zimmermann, Digest II 929 and the note on the judgment of 22.2.2006 (III CZP 8/06) by *M. Nesterowicz,* Prawo i Medycyna no 1/2007; *Justyński* in: Nesterowicz, Czyny niedozwolone 214. *Justyński* criticises the judgment, inter alia, for making the level of compensation dependent on the injured party's financial situation, which is not in line with the principles of the law of damages, but rather of social security law.

214 V CK 16/03, OSNC no 6/2004, item 104; for more information on the case see *Bagińska/Nesterowicz* in: Winiger/Koziol/Koch/Zimmermann, Digest II 927 ff; *Bagińska* in: Koziol/Steininger, European Tort Law 2004, 466 ff.

215 SN of 13.10.2005, IV CK 161/05, OSP no 6/2006, item 71; SN of 12.6.2008, III CSK 16/08, OSNC no 3/2009, item 48 (for more information on the case see *Bagińska/Nesterowicz* in: Winiger/Koziol/Koch/Zimmermann, Digest II 596 f; *Bagińska* in: Koziol/Steininger, European Tort Law 2009, 491 f); SN of 6.6.2010, II CSK 580/09, LEX no 602234. For a diverging view see SN of 22.2.2006, III CZP 8/06, OSNC 2006/7-8/123, in which the Supreme Court stated that the right to abortion is not a personality right and contested the view that it constitutes an element of the right to plan a family or an element of liberty. It indicated the woman's »right to make a conscious decision concerning the termination of pregnancy«. Critically on this *Justyński* in: Nesterowicz, Czyny niedozwolone 204 f.

216 III CSK 16/08, OSNC no 3/2009, item 48.

II. Causation

A. General remarks

3/77 Causation fulfils a dual function in tort law: it is a prerequisite of liability and at the same time a factor setting the limits of liability, ie determining the extent of damage that must be compensated[217]. The first step in the course of establishing causation in Polish law is, quite unsurprisingly, a conditio sine qua non test, used to »sift away« events that are not causally connected with the damage inflicted. The test allows the determination of whether an event attributed to the defendant can be taken into account at all in the process of assessing the latter's liability[218]. The second step is the application of the criterion of adequacy, which finds its legal basis in art 361 § 1 KC, according to which the person obliged to pay damages is only liable for the *normal* consequences of the act or omission from which the damage resulted[219]. Although the provision only speaks of the consequences of an »act or omission«, it is beyond doubt that the criterion of normality also refers to situations where damage results from events which are neither acts nor omissions[220]. The theory of adequacy is dealt with under no 3/148 ff below.

B. Causation through someone's sphere

3/78 Liability does not necessarily depend on causal, damaging conduct of the liable party him/herself; a good example here is vicarious liability for auxiliaries (art 430 KC)[221] or strict liability for various sources of danger (arts 433, 434, 435, 436 KC)[222]. As is rightly emphasised[223], in such cases the liable party is often at least indirectly involved in the chain of causation in that he/she employed the auxiliaries or holds the things that caused damage, or put a dangerous undertaking into operation, although in some instances even indirect causation cannot be affirmed and it is solely causation by the sphere of auxiliaries/things/undertakings which suffices to trigger liability.

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217 See, inter alia, *Dybowski* in: Radwański, System Prawa Cywilnego 247; *Szpunar,* Ustalenie odszkodowania 9.

218 *Banaszczyk* in: Pietrzykowski, Kodeks cywilny 1325.

219 Translation by *Bagińska* in: Oliphant/Steininger, Basic Texts 192.

220 *A. Koch,* Związek przyczynowy jako podstawa odpowiedzialności odszkodowawczej w prawie cywilnym (1975) 166 ff; *Dybowski* in: Radwański, System Prawa Cywilnego 255.

221 See no 3/124 below.

222 See no 3/127 ff below.

223 Basic Questions I, no 5/62 f.

C. Omissions as cause

3/79 As already noted, it is expressly recognised in Polish law (art 361 § 1 KC) that omissions can be causal for damage. As the Supreme Court stated in one of its judgments dating from the 1950s, a normal causal connection between a faulty omission and damage exists when an action, if it had been taken, would have eliminated the factor remaining in normal causal connection with the damage[224]. The causality of omissions in Poland is – in accordance with a view widely held internationally – commonly associated with the existence of a duty to act[225]. In order for liability to arise, a duty to act must therefore be established as well as a possibility to act on the part of the person to whom liability is attributed and the fact that an action, if undertaken, could have prevented the occurrence of damage in the normal course of events[226].

D. The attenuation of the causation requirement

1. Liability of several tortfeasors

3/80 There is no equivalent of § 1301 ABGB or of § 830(1) sent 1 BGB in the Polish Civil Code. The liability of several tortfeasors is regulated in art 441 § 1 KC, which is the equivalent of § 840 (1) BGB and states that if several persons are liable for (one and the same – comment KLR) damage inflicted by a delict, their liability is joint and several. This applies both to co-perpetrators and to situations in which each of the tortfeasors is liable on a different tort law basis (and also on the basis of a different principle of liability)[227]. Art 441 KC does not allow for an abrogation of joint and several liability and a distribution of damages pro rata parte[228];

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224 SN judgment of 10.12.1952 (C 584/52, PiP no 8/1953, 368), cited after *M. Nesterowicz,* Adekwatny związek przyczynowy jako przesłanka odpowiedzialności cywilnej w świetle orzecznictwa sądowego, in: A. Nowicka (ed), Prawo prywatne czasu przemian. Księga pamiątkowa ku czci Profesora Stanisława Sołtysińskiego (2005) 194.

225 *Nesterowicz* in: Nowicka, Prawo prywatne czasu przemian 194; *Dybowski* in: Radwański (ed), System Prawa Cywilnego 269; *Kaliński* in: Olejniczak, System Prawa Prywatnego 134.

226 See *Banaszczyk* in: Pietrzykowski, Kodeks cywilny 1332 f and the literature cited there.

227 *Safjan* in: Pietrzykowski, Kodeks cywilny 1700; *Dybowski* in: Radwański, System Prawa Cywilnego 328.

228 In contrast to the Code of Obligations; in accordance with art 137 KZ, such a distribution was allowed if it was proven who and to what extent contributed to the infliction of damage. The change in Polish law introduced by art 441 KC was aimed at improving the situation of the injured party; see *M. Nesterowicz/E. Bagińska,* Poland, in: B. Winiger/H. Koziol/B.A. Koch/R. Zimmermann (eds), Digest of European Tort Law, vol I: Essential Cases on Natural Causation (2007) 328; *E. Bagińska,* Aggregation and Divisibility of Damage in Poland: Tort Law and Insurance, in: K. Oliphant (ed), Aggregation and Divisibility of Damage (2009) 308; *M. Nesterowicz/E. Bagińska,* Multiple Tortfeasors under Polish Law, in: W.V. Horton Rogers (ed), Unification of Tort Law: Multiple Tortfeasors (2004) 153.

a person who is jointly and severally liable for damage cannot therefore demand that his/her liability towards the injured party be reduced due to the fact that he/she contributed to the damage to a lesser degree than another joint and several debtor[229]. Unlike the Code of Obligations, which made joint and several liability dependent on damage being caused by several persons *jointly*[230], the Civil Code does not require a subjective connection between the concurrent tortfeasors[231]; it is enough that their conduct objectively contributed to the damage caused[232]. Since art 441 KC does not establish liability for intentional joint action, but rather joint and several liability of persons on whom tort law imposes liability for one and the same damage, a consideration of the problems analysed by *Koziol* under nos 5/73 and 5/74 of »Basic Questions of Tort Law from a Germanic Perspective« seems irrelevant as far as Polish law is concerned.

2. Alternative causation

a. Joint and several liability versus freedom from liability in the case of several events which would trigger liability

If a victim suffers damage that was caused either by event 1 or event 2, each attributable to a different perpetrator, and it cannot be established which of the events is in reality the cause, one view is that both perpetrators are liable jointly and severally. There is no equivalent of § 830 (1) sent 2 BGB in the Polish Civil Code nor any other provisions dealing expressly with the issue of alternative causation (or any other instance of uncertain causality), so the question had to be settled by doctrine. According to *Lewaszkiewicz-Petrykowska,* joint and several liability is justified when the behaviour of several persons, acting jointly or separately, induces a dangerous situation, and the infliction of damage to a third party is the realisation of the danger induced[233]. *Lewaszkiewicz-Petrykowska* emphasises the existence of an adequate causal connection between the creation of a perilous situation **3/81**

229 See, inter alia, SN judgment of 2.12.1970 (II CR 542/70, OSNC no 9/1971, item 153); SN judgment of 25.8.1978 (III CZP 48/78, OSNC no 4/1979, item 64). The fact that one tortfeasor contributed to the damage to a lesser degree than another is only of significance as far as recourse claims between the liable parties are concerned. In accordance with art 441 § 2 KC, if the damage resulted from the acts or omissions of several persons, the person who made good the damage may demand from the other persons the reimbursement of an adequate share depending on the circumstances, and in particular on the fault of a given person as well as the degree of his/her contribution to the occurrence of the damage.

230 See art 137 § 1 KZ.

231 See, inter alia, *Nesterowicz/Bagińska* in: Winiger/Koziol/Koch/Zimmermann, Digest I 331; *E. Bagińska,* Odpowiedzialność deliktowa w razie niepewności związku przyczynowego. Studium prawnoporównawcze (2013) 127 f.

232 See *Koch,* Związek przyczynowy 210.

233 *B. Lewaszkiewicz-Petrykowska,* Wyrządzenie szkody przez kilka osób (1978) 77 f; see also *A. Szpunar,* Wyrządzenie szkody przez kilka osób, PiP no 2/1957, 289 f.

and the triggering of the damaging factor[234]. The chain of causation is therefore as follows: the perpetrators' behaviour – a dangerous situation as a consequence of the perpetrators' action – damage suffered by a third party as a realisation of the danger[235]. This approach is criticised by *Kaliński,* who points out that between the danger induction and the damage infliction an event occurs which can be attributed only to one perpetrator and is the real cause of damage, and states that in cases where the existence of a causal connection has not been proven, one of the prerequisites of liability is missing[236]. *Ohanowicz, Górski* and *Czachórski* also hold that neither (none) of the alternative perpetrators can be held liable since a mere *possibility* of a causal link is not sufficient to establish liability[237]. Adopting the view advocated by *Lewaszkiewicz-Petrykowska* in fact means – although without an express admission that this is the case – accepting an attenuation of the causation requirement and regarding merely potential causation in the sense of conditio sine qua non as sufficient when a »dangerous situation« is created, ie when there is a high degree of specific risk[238].

3/82 The Supreme Court has to date dealt with the problem of alternative causation of events justifying strict liability and held that the liability of potential tortfeasors in such cases is joint and several[239].

3/83 As follows from the above, only all-or-nothing solutions of the problem of alternative causation are currently supported in Poland. An adoption of the theory of partial liability in proportion to the degree of likelihood of damage being caused by each of the potentially causal events would need an explicit acceptance of the concept of potential causation, which is not the case in Poland de lege lata. There is, however, a chance that this state of affairs will change as the concept of liability based on potential causation found support in the Commission for the Codification of Private Law and was introduced into a 2009 draft of the new civil code[240].

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234 *Lewaszkiewicz-Petrykowska,* Wyrządzenie szkody 78.

235 *Dybowski* in: Radwański, System Prawa Cywilnego 264.

236 *Kaliński* in: Olejniczak, System Prawa Prywatnego 138.

237 *Ohanowicz/Górski,* Zarys 61; *Czachórski,* Prawo zobowiązań 134.

238 Cf Basic Questions I, no 5/77 ff, no 5/124 and the literature cited therein.

239 See SN judgment of 4.7.1985 (IV CR 202/85, LEX no 8724), where the Supreme Court stated that if two persons may be strictly liable for damage and there are no grounds to establish whose conduct was the real cause of damage, both these persons are liable jointly and severally if neither of them can prove the existence of circumstances exempting him from liability. More on this *Bagińska* in: Oliphant, Aggregation 311 f.

240 For more on this see *Bagińska,* Odpowiedzialność deliktowa 367. *Bagińska* expressed approval for the draft provision establishing causation to the extent corresponding to the likelihood of damage having been brought about by each of the potentially causal events, which closely resembles art 3:103 of the Principles of European Tort Law (art 3 § 3 of the 2009 draft).

b. Event which would trigger liability and »coincidence« as competing causes

3/84 As *Koziol* points out, the practically significant illustrations of the problem in question are provided by the field of medical malpractice[241], where situations frequently occur in which it is unclear whether damage resulted from such malpractice or from the patient's medical predisposition. The approach of Polish courts to medical malpractice cases has been to mitigate the otherwise strict requirements with regard to causation[242]. The causal link in such cases does not need to be proven with certainty; a high degree of probability that the doctor's or hospital's faulty conduct caused the damage suffices[243]. Moreover, it is stressed that if there is negligence on the doctor's part, the proof that there are other factors that could possibly have caused the damage, or that the treatment posed increased risk due to the patient's condition, will not result in exemption from liability[244]. Also, the existence of an adequate causal connection between the negligent conduct and the damage may be established on the basis of a factual presumption pursuant to art 231 of the Code of Civil Procedure[245], according to which the court may consider as established facts significant for the resolution of a case if such a conclusion can be drawn from other established facts[246].

3/85 The above solution is an all-or-nothing approach: if the court considers causation to be proven, the victim will be compensated, and if not, no damages will be awarded[247]. Unlike in Germany or Austria, there are no provisions introducing liability for potential causation in Polish law, so not even a starting point[248] exists for adopting partial liability in proportion to the degree of likelihood of damage being caused by the perpetrator. The same is true for the injured party's contribution to the damage: based on art 362 KC, dealing with contributory responsibility (see no 3/140 ff below), it would not be admissible to treat any circumstance on the victim's part as legally relevant and leading to a reduction of compensation if it was only *potentially* causal and if no causal link could be proven between this circumstance and the damage suffered. Another reason for the inapplicability of

241 Basic Questions I, no 5/86.

242 *K. Bączyk-Rozwadowska,* Medical Malpractice and Compensation in Poland, Chicago-Kent Law Review, vol 86, no 3, 1239 f.

243 SN judgment of 13.6.2000, V CKN 34/00, LEX no 52689. See also, inter alia, SN judgment of 17.6.1969, II CR 165/69, OSP no 7/1970, item 155 (a »sufficient degree of probability« is enough).

244 Inter alia SN of 17.10.2007, II CSK 285/07, LEX no 490418*; M. Nesterowicz,* Prawo medyczne (2010) 96.

245 Kodeks postępowania cywilnego. Act of 17 November 1964, consolidated text Dz U 2014, item 101 with later amendments.

246 Inter alia SN of 11.1.1972, I CR 516/71, OSNC no 9/1972, item 159; see also *Bączyk-Rozwadowska,* Chicago-Kent Law Review, vol 86, no 3, 1243.

247 There have been attempts by Polish courts to establish de facto partial liability, but they have been subject to criticism; on this issue see *Bagińska,* Odpowiedzialność deliktowa 188 f.

248 Basic Questions I, no 5/91.

art 362 KC is that it only allows for a reduction of damages if what contributed to the harm was the injured party's *conduct* (ie action or omission), and not a circumstance on which he/she had no influence, such as eg an illness[249].

c. The doctrine of loss of a chance as the better means to a solution?

3/86 The theory of loss of a chance is in principle not accepted in Polish law[250]. It is held that lost chance qualifies as »préjudice éventuel« and as such does not constitute compensable damage[251]. Two exceptions from this rule are indicated in the relevant literature: one follows from art 444 § 2 KC, pursuant to which compensation is due inter alia for the *deterioration of the victim's prospects for the future* resulting from bodily injury or a health disorder[252], and the other finds its legal basis in art 446 § 3 KC, which deals with damages awarded in the case of death of the primary victim, and which allows for the compensation of the loss of a chance to obtain from the deceased the financial means of subsistence not covered by the duty to redress damage by way of an annuity within the framework of art 446 § 2 KC[253]. Notwithstanding the doctrinal lack of approval for the discussed theory[254], courts are known to employ the term »loss of a chance«, and to go on to award pecuniary as well as non-pecuniary damages[255]. This concerns inter alia cases qualified as instances of »the loss of a chance of recovery«. For example, in a fairly recent decision the Supreme Court stated that *»damage* (...) *may consist* in the *loss or reduction of a chance of being cured,* as well as a *reduction of a chance of a health improvement«*[256] (emphasis KLR), but at the same time held that such damage is compensable by way of an annuity provided that it »expresses itself in one of the forms indicated in art 444 § 2 KC«, that is, a complete or partial loss of working capacity, increased needs or diminished prospects for the future (see no 3/162 below) The

249 See inter alia SN of 13.1.1997, I PKN 2/97, OSNP no 18/1997, item 336.

250 For details on the Polish approach to the doctrine of loss of a chance see *Bagińska,* Odpowiedzialność deliktowa 239 ff.

251 Instead of many see *Dybowski* in: Radwański, System Prawa Cywilnego 280.

252 It is emphasised that the deterioration of future prospects constitutes an independent basis for the award of damages provided that it entails a limitation of earning capacity. An oft-cited example of such a situation is the disfigurement of the face of an actor; see inter alia *Safjan* in: Pietrzykowski, Kodeks cywilny 1729.

253 Thus *Kaliński* in: Olejniczak, System Prawa Prywatnego 104; *idem,* Szkoda na mieniu 265; similarly *E. Bagińska,* Causal Uncertainty and Proportional Liability in Poland, in: I Gilead/M.D. Green/B.A. Koch (eds), Proportional Liability: Analytical and Comparative Perspectives (2013) 268. For more on arts 444 § 2 KC and 446 § 3 KC see no 3/162 below.

254 *E. Bagińska,* Medical Liability in Poland, in: B.A. Koch (ed), Medical Liability in Europe. A Comparison of Selected Jurisdictions (2011) 424.

255 *Eadem,* Odpowiedzialność deliktowa 239.

256 SN judgment of 17.6.2009, IV CSK 37/09, OSP no 9/2010, item 93.

case concerned the attending doctors' failure to diagnose a baby's cerebral palsy as well as epilepsy[257], which resulted in a delay in starting the necessary treatment, the effectiveness of which was estimated at twenty percent. It was established that an adequate causal connection existed between the delay in starting the treatment and the reduction of a chance that it would bring the desired results, and the Supreme Court stated that it would be inconsistent not to acknowledge that the delay was also causally connected to the child's increased needs, manifesting themselves as the necessity to (possibly) incur higher expenses due to the greater extent of the treatment needed by him under the circumstances.

3/87 As already indicated, Polish courts may deal with what they describe as »loss of a chance« by awarding non-pecuniary damages[258]. For example, in a judgment issued in January 1978 the Supreme Court held that the claimant's non-pecuniary loss embraced, among other things, an »extremely serious limitation of life opportunities« comprising inter alia the *loss of a chance to have children* resulting from her disability caused by medical malpractice[259].

d. Alternative perpetrators and alternative victims – the theory of market share liability?

3/88 In cases referred to in this section we are again dealing with the problem of potential causation, although this time a different one: in the model »mountaineering« example given by *Koziol*[260] it is certain that each of the perpetrators caused damage, but causation by either of them cannot be proven in relation to any individual victim. Since each of the perpetrators has definitely caused damage, it does not seem fitting to argue for a »no liability« solution due to lack of a causal link (although from a strictly dogmatic point of view there are valid arguments for it as, in order to trigger liability, a causal connection in the sense of conditio sine qua non needs to be proven between a particular cause and a particular result, and in the case in question we cannot state that K1 would definitely not have suffered damage if mountain climber B1 had not caused a stone to fall). Since each perpetrator only caused damage to *one* victim, joint and several liability of both perpetrators towards both victims also seems out of place and not in line with art 441 KC, which requires that each of the perpetrators be liable for one and the same damage.

3/89 If Polish courts were to deal with a case similar to the DES-cases, it seems unlikely that they would reject the manufacturers' liability, but at the same time it

257 The diseases were self-developed (not caused by malpractice).
258 See *Bagińska/Nesterowicz* in: Winiger/Koziol/Koch/Zimmermann, Digest II 1114; *Bagińska,* Odpowiedzialność deliktowa 239.
259 IV CR 510/77, OSNC no 11/1978, item 210.
260 Basic Questions I, no 5/105.

is difficult to speculate what solution and what argumentation they would adopt. As for the market share theory, it may not – as *Bagińska* points out – be applied in Poland as it would be in violation of the only provision of the Civil Code that deals with causation – namely art 361 § 1 KC[261].

3. Cumulative causation

3/90 Like in the Germanic systems, in cases of cumulative causation (ie in situations where two real events take place simultaneously and both would have brought about the same damage on their own) the perpetrators' liability is assumed to be joint and several (art 441 KC). As *Lewaszkiewicz-Petrykowska* explains, in such cases a complete damaging act is committed by each of the perpetrators and both these acts are potentially causal (both pose a risk of the damage that was actually inflicted). She states that since the injured party could obtain compensation from each of the perpetrators as in both cases the court would have to assume the existence of a causal connection based on the high probability of such, and since the victim cannot possibly be compensated twice for one and the same damage, the only solution is joint and several liability[262]. A different approach is taken by *Kaliński,* who holds that in the cases in question the conditio sine qua non test should be modified and that it ought to be examined whether the damaging result would also have ensued in the absence of all the circumstances that accompany the event under consideration[263]. If the answer is affirmative, then the event must be regarded as causal for the result[264].

4. Superseding causation

3/91 According to the traditional and still prevailing view, the fact that damage would have otherwise been brought about by a second, later event, is to be disregarded (ie the first perpetrator is not to be exempted from liability if a subsequent event would have brought about the same damage)[265]; only real causation is therefore legally relevant[266]. This corresponds with the predominant view represented in Austria[267]. *Szpunar,* however, points out that one needs to take into account events

261 *Bagińska* in: Oliphant, Aggregation 314. *Bagińska* opts for joint and several liability of all tortfeasors towards each of the victims.
262 *Lewaszkiewicz-Petrykowska,* Wyrządzenie szkody 78.
263 Cf Basic Questions I, no 5/112.
264 *Kaliński* in: Olejniczak, System Prawa Prywatnego 141.
265 See, inter alia, *Szpunar,* Ustalenie odszkodowania 43. SN judgment of 16.2.1965, OSNC no 11/1965, item 194.
266 *Jastrzębski,* KPP no 3/2003, 614.
267 Basic Questions I, no 5/114.

planned before damage infliction and gives as an example the destruction of a house that was to be demolished anyway[268]. A different view distinguishes between »direct« damage, ie harm caused to an existing object, the assessment of which does not change as a result of later events, and »indirect« damage, such as lucrum cessans or increased expenses. As regards the latter, subsequent events should be ignored if they take on the form of a misadventure which causes personal injury, but taken into account in the case of damage which entails the liability of another person or damage to property[269]. The dominant view with regard to misadventures as far as personal injuries are concerned is mirrored in SN judgment of 16 February 1965[270], in which the Supreme Court held that an unfortunate random event (in this case the victim's going down with tuberculosis), which alone would have caused the victim's disability, and which affected an already partially disabled person, does not nullify the effects of the event which caused the partial disability. This is contrary to *Bydlinski's* view, shared by *Koziol,* that if the second event is a coincidence, it is the victim who must bear its consequences[271]. In the Polish literature such an approach is taken by *Kaliński,* who considers the case of a person losing two fingers as a result of a tort and then suffering from a stroke, the effect of which is a paralysis, and states that the stroke should release the tortfeasor from liability for the loss of working capacity caused by the loss of fingers[272].

3/92 The issue of superseding causation was recently dealt with in detail by *Jastrzębski,* who holds a view different from the hitherto predominant one, namely that the admissibility of taking into account reserve causes (Reserveursachen) – and indeed a necessity to do so – is a simple consequence of adopting the difference theory as a method of damage calculation[273]. He points out that reducing the perpetrator's liability as a result of a causa superveniens is nothing other than transferring to the injured party the risk that he/she would have been exposed to anyway (ie irrespective of the first damaging event). If, on the other hand, reserve causes were ignored, the hypothetical state of the victim's patrimony would be determined based only on events aggravating damage, which can hardly be justified[274]. Notwithstanding

268 *Szpunar,* Ustalenie odszkodowania 43.

269 *Dybowski* in: Radwański, System Prawa Cywilnego 262. In this respect, *Jastrzębski* counters that common sense speaks against regarding as a cause of damage entailing the liability of another person an event attributed to this person that would only have brought about the damage if the first event had not happened (cf Basic Questions I, no 5/116); if, notwithstanding this illogicality, such an event were to be treated as a real cause, the problem in question would no longer be superseding causality but an issue of multiple causes instead; *Jastrzębski,* KPP no 3/2003, 617.

270 I PR 330/64, OSNC no 11/1965, item 194.

271 Basic Questions I, no 5/118, and *F. Bydlinski,* Probleme der Schadensverursachung nach deutschem und österreichischem Recht (1964) 78 ff, 95 ff cited therein.

272 *Kaliński* in: Olejniczak, System Prawa Prywatnego 142.

273 Cf Basic Questions I, no 5/114.

274 *Jastrzębski,* KPP no 3/2003, 631 f, 645 f.

the above, *Jastrzębski* holds that certain subsequent events should not be taken into account; these are, firstly, reserve causes which would, if they had taken place, entail the liability of a third party (otherwise the injured party would have been deprived of compensation for damage caused in a way giving rise to liability since the third party could successfully defend him/herself by claiming that he/she did not cause damage since it was already inflicted), and secondly, subsequent events in the case of damage calculated using the objective method. It must be mentioned here that *Jastrzębski* excludes from the notion of *superseding causation* subsequent events that actually »exerted influence« and »caused damage absorbing the harm caused previously«[275]. (I have put the description in inverted commas as in my opinion it is not accurate: subsequent damage cannot »absorb« earlier damage since the latter is already inflicted; it would therefore be more appropriate to talk about events that actually ensued and caused damage that *would have* absorbed the harm caused previously), which *Koziol* treats as superseding causation, although at the same time admits, following *Bydlinski,* that they are indeed (as are all instances of superseding causation) cases of cumulative causation stretched out chronologically[276]. *Jastrzębski* categorises such situations as cases of multiple causes which result either in joint and several liability (if damage is an indivisible result of several causes, each of which justifies liability), or in the exclusion of liability of the first perpetrator for any damage which results from the second event (when the latter is nova causa interveniens)[277]. To illustrate the former, he gives an example of a case decided in France in the 1960s, concerning indivisible damage consisting in the victim's complete incapacity to work, which resulted from two subsequent torts, each of which caused the victim to lose one eye[278]. *Jastrzębski* holds that the notion of *superseding causation* encompasses events »which do not in reality join in the course of events« as they are »deprived of the possibility to take place *or* (emphasis KLR) exert influence by the (initial – comment KLR) cause«, and treats as »superseding causation stricto sensu« events that are purely hypothetical in that they never actually *occur*[279]. His classification is therefore different to *Koziol's,* who considers as cases of superseding causation only events that actually took place[280] and classifies lawful alternative behaviour, treated by *Jastrzębski* as an example of superseding causation[281], as a separate, albeit related, phenomenon.

275 *Jastrzębski,* KPP no 3/2003, 619.
276 Basic Questions I, no 5/115.
277 *Jastrzębski,* KPP no 3/2003, 619 f.
278 *Jastrzębski,* KPP no 3/2003, 619 f, and cited therein Tribunal correctionnel de la Seine (Tr corr Seine) judgment of 5. 5. 1965, Juris Classeur Périodique 1965 III 14332.
279 *Jastrzębski,* KPP no 3/2003, 623.
280 See Basic Questions I, no 5/125.
281 *Jastrzębski,* KPP no 3/2003, 640.

3/93 To conclude the remarks above, it should be noted that the Supreme Court has recently issued several decisions in which it expressed a view diverging from the hitherto prevailing one and considered taking causa superveniens into account as in principle admissible[282]. A reserve cause was regarded as a factor limiting or excluding liability in a judgment of 2 March 2006[283], which concerned the following situation: the claimants' legal predecessors were unlawfully refused, inter alia, the right of (temporary) ownership of an immovable. Several years later the real property in question was transferred to a housing association. The Court stated that had the claimants' predecessors been treated in accordance with the law and granted ownership, they would have been necessarily subject to expropriation (due to the fact that the property was destined to be transferred to the housing association) and would have received appropriate compensation. In consequence, it was held that the claimants' damage does not consist in the loss of property, but in the non-receipt of appropriate compensation. The circumstance that the claimants' predecessors would have been expropriated was therefore treated as a factor influencing the amount of damages. The judgment was criticised for taking into account a reserve cause when the certainty of its occurrence might have given rise to serious doubts[284]. Causa superveniens was also treated as a factor influencing the extent of damage in a decision of 29 April 2010[285].

3/94 Another judgment worth mentioning here, issued in January 2005[286], concerns the issue of lawful alternative behaviour. In the judgment, the Supreme Court expressed its approval of the view according to which reserve causes should in principle be taken into account, although with certain exceptions to this rule[287], one of which applied precisely to the facts of the case decided. The Court held that the perpetrator cannot rely on the fact that the injured party would have suffered the same damage as a result of his subsequent alternative lawful behaviour *if the perpetrator's actual conduct violated a norm intended to prevent such damage*[288] (for details see no 3/152 below). It has been inferred from the judgment conclusion that lawful alternative behaviour *can* be taken into account if the infringed norm was *not meant* to prevent the harm that was inflicted by the unlawful conduct[289].

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282 However, as *Bagińska* points out, the decided cases do not concern personal injury; see *Bagińska,* Odpowiedzialność deliktowa 187.

283 SN judgment of 2.3.2006, I CSK 90/05, OSNC no 11/2006, item 193.

284 *Banaszczyk* in: Pietrzykowski, Kodeks cywilny 1331. See also *J. Jastrzębski,* Note on the judgment of 2.3.2006 (I CSK 90/05), Palestra no 3-4/2007, 325 f.

285 IV CSK 467/09, LEX no 653781. For more on the case, see *E. Bagińska,* Poland, in: H. Koziol/B.C. Steininger (eds), European Tort Law 2010 (2011) 459 ff.

286 SN judgment of 14.1.2005, III CK 193/04, OSP no 7-8/2006, item 89.

287 Thus also SN judgment of 15.4.2010, II CSK 544/09, OSNC-ZD no 4/2010, item 113 (for a commentary on the judgment, see *Bagińska* in: Koziol/Steininger, European Tort Law 2010, 456 ff).

288 This view was reiterated in the SN judgment of 29.4.2010, IV CSK 467/09, LEX no 653781.

289 Thus *Banaszczyk* in: Pietrzykowski, Kodeks cywilny 1331.

3/95 In a judgment of 29 April 2010[290], the Supreme Court listed conditions that must be fulfilled in order for a causa superveniens to be taken into account: the supervening cause must be a link in a parallel, hypothetical chain of causation, independent of the actual sequence of events; the damaging event must not have created an opportunity for the hypothetical cause to occur (since the occurrence of the latter is prevented by the former); the injured party must prove that the occurrence of the supervening cause in the absence of the damaging event would have been almost certain[291].

290 IV CSK 467/09, OSNC-ZD no 4/2010, item 116.
291 On this see also *Bagińska* in: Koziol/Steininger, European Tort Law 2010, 460.

Part 6 The elements of liability

I. Wrongfulness

A. The concept of wrongfulness

As in most legal systems, wrongfulness (in Polish law and doctrine the term »bezprawność« [literally: »unlawfulness«] is used)[292] is in principle significant in the area of fault-based liability[293], although it is also the prerequisite of liability for the exercise of public authority (arts 417 ff KC), which since 2004[294] is independent of fault[295]. A new principle of liability has even been distinguished in this context (next to fault, risk and equity), namely that of unlawfulness, although the necessity of this distinction has been questioned[296]. **3/96**

Wrongfulness is not mentioned explicitly in art 415 KC, pursuant to which »any person who by his fault has caused damage to another person is obliged to redress it«[297]. According to the traditional view, it constitutes an objective element of fault[298], but many authors regard it as a prerequisite of fault (see also no 3/110 below)[299]. While there is no unanimity as to the legal qualification of wrongful- **3/97**

292 On the concept of wrongfulness in Polish law, see also *G. Żmij,* Wrongfulness as a liability's prerequisite in art 415 Polish Civil Code, in: B. Heiderhoff/G. Żmij (eds), Tort Law in Poland, Germany and Europe (2009) 13 ff.

293 It is therefore irrelevant in the field of strict liability; see, inter alia, *Kaliński* in: Olejniczak, System Prawa Prywatnego 60; *Olejniczak* in: Kidyba, Kodeks cywilny, commentary to art 435, no 15; SN judgment of 7.4.1970, III CZP 17/70, OSP no 9/1971, item 169; SN 28.11.2007, V CSK 282/07, OSNC-ZD no 2/2008, item 54; SN of 9.5.2008, III CSK 360/07, LEX no 424387; SN of 12.12.2008, II CSK 367/08, LEX no 508805.

294 For more on the modified rules governing liability for the exercise of public authority see *Bagińska* in: Koziol/Steininger, European Tort Law 2004, 462 ff.

295 It must be noted that rather than employ the term *unlawful (bezprawny),* which is used in several other Civil Code provisions (inter alia, art 24, art 423 KC), the legislator opted for the constitutional expression *incompatible with the law (niezgodny z prawem)* in art 417 KC. This has resulted in two diverging interpretations of this prerequisite of liability for the exercise of public authority (see no 3/97 below).

296 *Radwański/Olejniczak,* Zobowiązania 218; *E. Bagińska,* Odpowiedzialność odszkodowawcza za wykonywanie władzy publicznej (2006) 217 ff.

297 Translation by *Bagińska* in: Oliphant/Steininger, Basic Texts 192.

298 *Czachórski,* Prawo zobowiązań 244; *W. Czachórski/A. Brzozowski/M. Safjan/E. Skowrońska-Bocian,* Zobowiązania. Zarys wykładu (2004) 210.

299 See, inter alia, *B. Lewaszkiewicz-Petrykowska,* Wina jako podstawa odpowiedzialności z tytułu czynów niedozwolonych, in: Studia Prawno-Ekonomiczne (1969) 90. *W. Warkałło* (Note on the SN judgment of 7.4.1962, 2 CR 546/61, PiP no 12/1963, 970) states that »wrongfulness (unlawfulness) is a necessary condition of fault-based liability, and not a separate form of fault or a component of fault«. *Warkałło's* statement refers to an old and no longer supported theory proclaimed by *R. Longchamps de Berier,* according to which fault consisted of two components: objective fault and subjective fault, and which the judgment of 7.4.1962 adopts.

ness, the need to single it out as a prerequisite of fault-based liability is not questioned[300]. The crux of the concept is the relationship between human behaviour and a rule laid down by the legal system[301]. In the area of fault-based liability, »bezprawność« is understood broadly[302], ie not only as an infringement of this legal provision or the other, but also as a violation of the »principles of community life«[303], whereas in the field of liability for the exercise of public authority, two views are presented: one favours the »traditional«, broad understanding[304], while the other supports a narrow concept of wrongfulness (ie » bezprawność« as a violation of a legal provision)[305].

3/98 There is some confusion as to whether due care necessary to avoid causing damage to others should be included in the concept of wrongfulness. Such care – assessed according to an objective standard (see no 3/118 below) – is generally treated as linked with fault in the »strict sense«[306], although it has also been convincingly argued that it is associated with wrongfulness[307].

3/99 It follows from the above that the Polish theory of wrongfulness qualifies as Verhaltensunrechtslehre (theory of wrongfulness of conduct)[308]. It is, however, also

300 Wrongfulness has also been defined as »objective inappropriateness« of human conduct; see *Machnikowski* in: Olejniczak, System Prawa Prywatnego 375 ff; *Czachórski/Brzozowski/Safjan/Skowrońska-Bocian,* Zobowiązania 210.

301 *Machnikowski* in: Olejniczak, System Prawa Prywatnego 378; *Lewaszkiewicz-Petrykowska* in: Studia Prawno-Ekonomiczne 90.

302 See, inter alia, *M. Sośniak,* Bezprawność zachowania jako przesłanka odpowiedzialności cywilnej za czyny niedozwolone (1959) 102 f; *A. Szpunar,* Czyny niedozwolone w kodeksie cywilnym, Studia Cywilistyczne (1970) 51; *Radwański/Olejniczak,* Zobowiązania 194 f; for a diverging view, supporting a narrow understanding of unlawfulness, see *K. Pietrzykowski,* Bezprawność jako przesłanka odpowiedzialności deliktowej a zasady współżycia społecznego i dobre obyczaje, in: M. Pyziak-Szafnicka (ed), Odpowiedzialność cywilna. Księga pamiątkowa ku czci Profesora Adama Szpunara (2004) 179.

303 The »principles of community life« clause is one of the general clauses encountered in Polish private law. By means of the clause, reference is made to moral rules of conduct universally accepted in society.

304 See, inter alia, *Bagińska,* Odpowiedzialność odszkodowawcza 315 f; *Banaszczyk* in: Pietrzykowski, Kodeks cywilny 1583.

305 *M. Safjan/K.J. Matuszczyk,* Odpowiedzialność odszkodowawcza władzy publicznej (2009) 47 f. *Z. Radwański,* Odpowiedzialność odszkodowawcza za szkody wyrządzone przy wykonywaniu władzy publicznej w świetle projektowanej nowelizacji kodeksu cywilnego, Ruch Prawniczy, Ekonomiczny i Socjologiczny (RPEiS) no 2/2004, 13; Judgment of the Constitutional Court (Trybunał Konstytucyjny), SK 18/00, Orzecznictwo Trybunału Konstytucyjnego no 78/2001, item 256.

306 See, inter alia, *Machnikowski* in: Olejniczak, System Prawa Prywatnego 381; *Szpunar,* Czyny niedozwolone 50 f; *Radwański/Olejniczak,* Zobowiązania – część ogólna 200; *Bagińska* in: Koziol/Steininger, European Tort Law 2005, 465.

307 *J. Dąbrowa,* Wina jako przesłanka odpowiedzialności cywilnej (1968) 220 f. *M. Krajewski,* Niezachowanie należytej staranności – problem bezprawności czy winy, PiP no 10/1997, 32 ff.

308 A view that all damage-causing conduct should be deemed unlawful has been subject to criticism; for more on this issue, see *Banaszczyk* in: Pietrzykowski, Kodeks cywilny 1559 and the literature cited therein.

argued that if an absolutely protected right is infringed by a given conduct, the conduct will be classified as unlawful, which seems at first glance to mirror the *Erfolgsunrechtslehre* (theory of wrongfulness established by the result), but is justified in line with the Verhaltensunrechtslehre concept: it is submitted that the conduct in question violates a norm addressed to the general public which prohibits such interferences[309].[310] In accordance with this view, an omission violating an absolutely protected right will only be deemed unlawful if there is a duty to act of a general (universal) character[311]. It is emphasised that an omission is only unlawful if it infringes a duty to act imposed by statute, and not by the »principles of community life«[312].

3/100 Wrongfulness alone is in principle not enough to justify liability for damage, but it suffices to trigger preventive and reparative injunctions as well as rights to act in self-defence. Wrongful but not faulty behaviour may lead to liability in combination with other factors. For example, children and the mentally ill may be fully or partially liable for the damage caused provided that they acted unlawfully and that their liability is justified under consideration of the economic circumstances (see no 3/136 below). Also, the wrongfulness of conduct of auxiliaries as well as that of children and the mentally ill is a prerequisite for the liability of respectively the entrusting and the supervising persons (see nos 3/120 and 3/124).

B. Protection against insignificant infringements?

3/101 Polish law does not contain an explicit general rule stating that no compensation should be awarded for trivial damage, but the concept of a significance threshold is known to it both in the field of pecuniary and non-pecuniary loss. As for non-pecuniary loss, a refusal of compensation is regarded as justified if objectively verifiable criteria indicate the triviality of the damage suffered (see also no 3/64 above)[313]. Such a general significance threshold has not been accepted in the field

309 Although, as rightly pointed out by *Koziol,* not all infringements are prohibited; minor violations must be tolerated (see Basic Questions I, no 6/8).

310 *Machnikowski* in: Olejniczak, System Prawa Prywatnego 380.

311 *Machnikowski* in: Olejniczak, System Prawa Prywatnego 380 and cited there the SN judgment of 17.12.2004, II CK 300/04, OSP no 2/2006, item 20, note by *M. Nesterowicz* (for a commentary on the case see *Bagińska* in: Koziol/Steininger, European Tort Law 2006, 382 f).

312 Due to the fact that the principles of community life do not sufficiently specify the extent of the duty to act or the person burdened with such a duty. See *Banaszczyk* in: Pietrzykowski, Kodeks cywilny 1559. A different view, according to which the unlawfulness of an omission may consist in an infringement of the principles of community life, has, however, also been presented; for more on this issue, see *Pietrzykowski* in: Pyziak-Szafnicka, Odpowiedzialność cywilna 171, FN 18.

313 See the SN judgment of 23.1.1975 (II CR 763/73, OSP no 7-8/1975, item 171), where the SN stated that the court should use the possibility to refuse compensation if non-pecuniary loss suffered by the victim consists solely in a slight physical discomfort and the liable party did everything

of pecuniary damage, which should as a rule be compensated in full, independent of its extent. An exception stemming from EU law is foreseen by provisions regulating product liability: art 449[7] § 2 KC stipulates a € 500 threshold in cases of damage to property. In the law of neighbours, art 144 KC provides that in the course of exercising his right, »the owner of an immovable should refrain from actions which would interfere with the use of neighbouring immovables over and above an »average degree«, determined in accordance with the social and economic purpose of the immovable as well as the local circumstances.« The owners of neighbouring immovables must therefore tolerate emissions not exceeding the said »average degree«, such emissions not being wrongful.

C. Protection of pure economic interests

3/102 According to *Pajor,* there is no hierarchy of legally protected interests in Polish law and therefore, in accordance with the principle of full restitution expressed in art 361 § 2 KC, as a rule »every instance of material damage is subject to compensation, including pure economic loss«[314]. It is only by way of exception that the scope of tortious protection is explicitly restricted to *injury to the person or damage to property*[315], which allows the conclusion that pure economic loss, ie financial loss not resulting from physical injury to the claimant's own person or property[316], is in principle not excluded from the scope of the duty to compensate and should be redressed, provided of course that it remains within the boundaries of adequacy (art 361 § 1 KC)[317]. Apart from the criterion of adequacy, the compensability of such loss is also restricted by the principle, accepted by the majority of scholars and supported by case law, that Polish tort law only allows for the compensation of losses suffered by a *direct victim,* ie by the person against whom the damage-triggering event was directed[318]; this principle is regarded as our system's way of »keeping the floodgates

possible in order to prevent damage and alleviate the discomfort, as in such a case equity considerations do not require making good the damage by means of monetary compensation.

314 *T. Pajor,* Poland, in: V.V. Palmer/M. Bussani (eds), Pure Economic Loss. New Horizons in Comparative Law (2009) 260.

315 Such a restriction is introduced by arts 435 and 436 KC (see no 3/126).

316 *H. Koziol* in: European Group on Tort Law, Principles of European Tort Law. Text and Commentary (2005) 32 and the literature cited therein.

317 See *Kaliński* in: Olejniczak, System Prawa Prywatnego 100 f.

318 See, inter alia, *Szpunar,* Odszkodowanie za szkodę majątkową 63, 165; *idem,* Note on SN judgment of 3.3.1956, 2 CR 166/56, OSPiKA no 7-8/1959, item 197, 382. *Radwański/Olejniczak,* Zobowiązania 258 f; *Ohanowicz/Górski,* Zarys 60 f; *Kaliński* in: Olejniczak, System Prawa Prywatnego 38; *Machnikowski* in: Olejniczak, System Prawa Prywatnego 384; SN judgment of 28.12.1972, I CR 615/72, OSPiKA no 1/1974, item 7; SN judgment of 13.10.1987, IV CR 266/87, OSNC no 9/1989, item 142; SN judgment of 11.12.2008, IV CSK 349/08, LEX no 487548.

shut«[319]. Art 446 KC, which entitles several categories of »indirectly aggrieved«[320] persons to compensation for their own losses resulting from the primary victim's death[321], is regarded as an exception confirming the rule that damages may only be awarded to primary victims. The correctness of the view that Polish tort law regards as compensable solely losses suffered by persons against whom the damage-triggering event was directed has, however, been convincingly questioned[322].

Bagińska and *Nesterowicz* state that pure economic loss will be compensated when it falls within the category of lost profits[323]. **3/103**

Pure economic interests are protected within the framework of culpa in contrahendo: a culpable infringement of pre-contractual rules of conduct will trigger a duty to redress damage resulting from the fact that the intended contract was not concluded or turned out to be void, such damage consisting in the costs incurred by the person expecting the conclusion and – although this is not universally accepted – profits lost by this person (mainly profits connected with a different contract that he/she did not conclude because he/she was expecting the first contract to take effect)[324]. **3/104**

As for delictual protection of contracts, which are an instrument for creating and protecting pure economic interests[325], it is generally accepted that an infringement of a contractual relationship by a third party may under certain circumstances trigger the latter's delictual liability. It is also convincingly argued that such liability will only arise in cases of third-party conduct *directed at* causing damage to the obligee, as such conduct must be considered wrongful due to the fact that it is contrary to the »principles of community life«. *Grzybowski* merely requires that the conduct in question is faulty[326], but *Machnikowski* persuasively argues that a negligent disregarding of a contract is not sufficient and that only intentional infringements are relevant[327]. **3/105**

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319 For more on this problem, see *Pajor* in: Palmer/Bussani, Pure Economic Loss 264.

320 *Bagińska/Nesterowicz* in: Winiger/Koziol/Koch/Zimmermann, Digest II 264.

321 For more on this provision, see, inter alia, *K. Ludwichowska-Redo,* Liability for Loss of Housekeeping Capacity in Poland, in: E. Karner/K. Oliphant (eds), Loss of Housekeeping Capacity (2012) 201.

322 *Łopuski,* KPP no 3/2004, 689; *M. Safjan,* Problematyka tzw. bezprawności względnej oraz związku przyczynowego na tle odpowiedzialności za niezgodne z prawem akty normatywne, in: L. Ogiegło/W. Popiołek/M. Szpunar (eds), Rozprawy prawnicze: księga pamiątkowa Profesora Maksymiliana Pazdana (2005) 1327 ff; *L. Stecki,* Problematyka odpowiedzialności za szkodę pośrednią, in: S. Sołtysiński (ed), Problemy kodyfikacji prawa cywilnego (studia i rozprawy). Księga pamiątkowa ku czci Profesora Zbigniewa Radwańskiego (1990) 300; *B. Lackoroński,* Odpowiedzialność za tzw. szkody pośrednie w polskim prawie cywilnym, in: J. Jastrzębski (ed), Odpowiedzialność odszkodowawcza (2007) 172 f.

323 *Bagińska/Nesterowicz* in: Winiger/Koziol/Koch/Zimmermann, Digest II 331.

324 For more on this, see *Radwański/Olejniczak,* Zobowiązania 95 f, 139.

325 *P. Cane,* Tort Law and Economic Interests (2006) 454 f, cited after: *W.H. van Boom,* Pure Economic Loss: A Comparative Perspective, in: W. van Boom/H. Koziol/C.A. Witting (eds), Pure Economic Loss (2004) 16.

326 *S. Grzybowski* in: Z. Radwański (ed), System Prawa Cywilnego, vol III, Part 1. Prawo zobowiązań – część ogólna (1981) 48.

327 See *Machnikowski* in: Olejniczak, System Prawa Prywatnego 386 and the literature cited there.

3/106 As in many other legal systems, surviving dependants are granted their own claim for compensation for the loss of maintenance in the case of death of the primary victim (art 446 § 2 KC). They may also demand compensation for other economic losses which are not susceptible to precise measurement (art 446 § 3 KC)[328].

3/107 If pure economic loss is caused intentionally, liability must in my opinion be regarded as justified because, firstly, the criterion of adequacy does not restrict the extent of compensation in such cases (see no 3/114 below), and secondly, since the perpetrator's conduct is directed against the person suffering the loss, liability will not be excluded by the principle that Polish tort law only allows for the compensation of losses suffered by a *direct victim* (see no 3/102).

II. Fault

A. Concept, prerequisites and meaning

3/108 It holds true for Polish law that strict liability has gained so much significance over the years that it is equal in status to fault-based liability[329]; one can therefore speak of a two-lane nature of liability[330].

3/109 Fault has not been defined by the Polish legislator, and scholarly deliberations on this concept have been influenced by the doctrine of criminal law. Formerly, fault was defined as the perpetrator's incorrect mental attitude towards his/her deed (a so-called »psychological concept«)[331], but this theory has largely been abandoned, and at the moment a so-called »normative concept« prevails, according to which, broadly speaking, fault can be attributed to a person if the said person might be *censured* for his/her misconduct which led to damage. Fault therefore boils down to »censurability« (blameworthiness)[332]. The adoption of the normative concept leads to the blurring of boundaries between wrongfulness and fault[333].

3/110 Since wrongfulness is not explicitly mentioned in art 415 KC, the traditional view is that it constitutes an objective element of fault, and that therefore fault consists of two components: objective (wrongfulness) and subjective (sometimes

328 See, inter alia, *Ludwichowska-Redo* in: Karner/Oliphant, Housekeeping Capacity 201.
329 See, inter alia, *Nesterowicz* in: Nesterowicz, Czyny niedozwolone 42.
330 Basic Questions I, no 6/79.
331 *Ohanowicz/Górski,* Zarys 126; for more on the psychological concept of fault, see *B. Lewaszkiewicz-Petrykowska,* Problem definicji winy, jako podstawy odpowiedzialności z tytułu czynów niedozwolonych, Zeszyty Naukowe Uniwersytetu Łódzkiego (ZNUŁ) 1959, no 14, 32 f.
332 *Lewaszkiewicz-Petrykowska,* ZNUŁ 1959, no 14, 43; SN judgment of 26. 9. 2003, IV CK 32/02, LEX no 146462.
333 See *Banaszczyk* in: Pietrzykowski, Kodeks cywilny 1556 and the literaturę cited therein.

defined as fault sensu stricto)[334]. Another view has, however, gained considerable support in recent decades, distinguishing wrongfulness from fault and treating the former as the prerequisite for the latter; eg according to *Lewaszkiewicz-Petrykowska,* fault is »a negative evaluation of a person's conduct, consisting in the possibility to censure the said person based on the analysis of his/her conduct and a norm in force«[335], while *Radwański* defines it as »a censurable decision of a person concerning his/her wrongful conduct«[336].

3/111 There are diverging views as to whether fault refers only to the perpetrator's conduct (ie whether only the conduct needs to be faulty)[337], or also to the damaging result[338]. The former offers a more sensible solution from the point of view of the injured party: since the perpetrator is liable for the damaging results of his censurable conduct even if he did not want them, or did not and could not foresee them, it is easier for the victim to prove fault.

3/112 Fault can only be attributed to persons who are sane and mentally mature. The capacity for fault under Polish tort law arises upon the completion of the thirteenth year of life (art 426 KC). This is a rigid boundary, which excludes examining the powers of discernment of persons below thirteen years of age. Persons aged thirteen and older may be considered incapable of acting culpably due to insanity[339]. In accordance with art 425 KC, »a person who for whatever reason is in a state which prevents him from making a conscious or free decision and from expressing his will is not liable for damage caused when in such a state« (§ 1); »however, a person who has been subjected to a disturbance of mental functions due to the use of intoxicating beverages or other similar substances is obliged to redress the damage, unless the state of disturbance was caused through no fault of his own« (§ 2)[340].

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334 See, inter alia, *Czachórski,* Prawo zobowiązań 244; SN judgment of 26.9.2003, IV CK 32/02, LEX no 146462.

335 *Lewaszkiewicz-Petrykowska,* ZNUŁ 1959, no 14, 43.

336 *Radwański/Olejniczak,* Zobowiązania 198.

337 See, inter alia, *Dybowski* in: Radwański, System Prawa Cywilnego 250; *J. Jastrzębski,* Interferencje adekwatnej przyczynowości oraz winy przy odpowiedzialności za szkodę majątkową, Przegląd Sądowy (PS) no 7-8/2004, 28; *Kaliński* in: Olejniczak, System Prawa Prywatnego 53 f; for more on this issue see *Kaliński* in: Olejniczak, System Prawa Prywatnego 52 f.

338 *W. Czachórski* in: Radwański, System Prawa Cywilnego, vol III, Part 1. Prawo zobowiązań – część ogólna (1981) 546 f; *Koch,* Związek przyczynowy 189 ff. *Radwański/Olejniczak,* Zobowiązania 200 (with regard to intentional fault).

339 There are diverging views as to the sanity of minors aged thirteen and older; it is either postulated that the issue should be assessed ad casum with the burden of proof of the minor's mental maturity resting with the injured party (inter alia, SN judgment of 11.1.2001, IV CKN 1469/00, OSP no 1-2/2002, item 2; *Z. Banaszczyk,* O odpowiedzialności deliktowej osoby małoletniej za czyn własny na zasadzie winy, in: M. Pyziak-Szafnicka (ed), Odpowiedzialność cywilna. Księga pamiątkowa ku czci Profesora Adama Szpunara [2004] 108 f), or that the minor's sanity may be assumed *(A. Szpunar,* note on the judgment of 11.1.2001, OSP no 6/2002, item 81; *Radwański/Olejniczak,* Zobowiązania 199).

340 Translation by *Bagińska* in: Oliphant/Steininger, Basic Texts 194.

3/113 Similarly to German and Austrian law, persons incapable of committing fault may still be held liable on the basis of equity (art 428 KC; see no 3/136 below).

3/114 Every form of fault and even the slightest degree of it triggers liability under Polish tort law[341]. Only exceptionally is responsibility restricted to instances of qualified fault (for example, an instigator, a person who consciously benefited from damage inflicted to another and – according to the prevailing view – an abettor are only liable for intent[342]; art 422 KC[343]). Another question is whether the degree of fault may influence the extent of liability, and in particular whether serious fault may justify transgressing the boundaries of adequacy and attributing to the perpetrator responsibility for the consequences of his conduct which cannot be considered normal. In principle, the tortfeasor is only liable for the normal consequences of his behaviour irrespective of the degree of fault (art 361 § 1 KC), but a deviation from this rule is accepted in cases of intention: it is argued that if the perpetrator's intent embraces abnormal consequences, so should his liability[344].

3/115 The degree of the tortfeasor's fault may influence the extent of compensable non-pecuniary loss suffered by the victim[345] as well as play a role when deciding on the reduction of the duty to compensate in cases of the victim's contributory conduct (see no 3/143 below).

3/116 In the case of intent, the perpetrator either wants to behave wrongfully or consciously accepts such possibility[346], or, alternatively (see no 3/111 above on the diverging views on whether fault concerns the perpetrator's conduct or the damaging result), either wants to cause damage through his/her wrongful behaviour, or consciously accepts such possibility[347].

3/117 Non-intentional fault in Polish private law centres on the concept of *niedbalstwo* (negligence)[348]. It is indicated in the relevant literature that guidance on how negligence should be assessed is to be found in art 355 KC, which states:

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341 SN of 10.10.1975, I CR 656/75, LEX no 7759.

342 *Lewaszkiewicz-Petrykowska,* Wyrządzenie szkody 107, 112, 117; *Radwański/Olejniczak,* Zobowiązania 202.

343 Art 422 KC: »Not only is the person who directly causes damage liable, but also anyone who induces or helps another person to cause the damage, as well as anyone who consciously benefited from damage caused to another person«; translation by *Bagińska* in: Oliphant/Steininger, Basic Texts 193.

344 *Koch,* Związek przyczynowy 190 ff; *Jastrzębski,* PS no 7-8/2004, 34; *T. Dybowski,* on the other hand, argues that the boundaries of adequacy are not transgressed as the consequences of conscious and intentional conduct are always adequate to such conduct: *Dybowski* in: Radwański, System Prawa Cywilnego 271.

345 See, inter alia, *Safjan* in: Pietrzykowski, Kodeks cywilny 1737 and SN of 19.8.1980, IV CR 283/80, OSNC no 5/1981, item 181 cited there; *Jastrzębski,* PS no 7-8/2004, 26, 34; *Szpunar,* Zadośćuczynienie 183.

346 *Machnikowski* in: Olejniczak, System Prawa Prywatnego 412.

347 *Radwański/Olejniczak,* Zobowiązania 200.

348 *Radwański/Olejniczak,* Zobowiązania 200.

»(§ 1) The debtor is obliged to exercise diligence which is generally required in the relations of a given type (due diligence). (§ 2) The debtor's due diligence in the field of his economic activity is determined taking into account the professional character of that activity.« Although said provision expressly refers to a *debtor,* it has been accepted both by courts[349] and scholars[350] that it also applies to extra-contractual relations.

B. Subjective or objective assessment of fault?

3/118 As in Austria and Germany, due diligence (due care), is assessed by reference to objectivised patterns of (due; diligent; careful) behaviour[351] and the standard of diligence is higher for professionals. The perpetrator's act is set against the pattern of behaviour of a diligent person acting under the same circumstances (in the same situation)[352]; it goes without saying that such an assessment blurs the boundaries between fault and unlawfulness[353]. Several authors rightly stress that a divergence from an objectivised pattern of behaviour is not tantamount to fault[354] and that only a perpetrator who could have behaved carefully under the circumstances is at fault[355]. It follows from the above that apart from setting the perpetrator's behaviour against a certain standard, one must take into account the circumstances under which such a divergence occurred[356]. A person will therefore not be at fault if it was physically impossible for him/her to comply with the standard, and he/she might not be deemed negligent if he/she was misinformed or threatened[357]. It is disputed whether, and to what extent, personal characteristics of the

349 SN judgment of 15.2.1971, III CZP 33/70, OSNC no 4/1971, item 59; SN judgment of 12.6.2002, III CKN 694/00, OSN no 9/2003, item 24.

350 See, inter alia, *Lewaszkiewicz-Petrykowska* in: Studia Prawno-Ekonomiczne 98; *Radwański/Olejniczak,* Zobowiązania 200; *Safjan* in: Pietrzykowski, Kodeks cywilny 1278. For a different view, pursuant to which art 355 is not applicable in the field of delictual liability, see *Z. Banaszczyk/P. Granecki,* O istocie należytej staranności, Palestra no 7-8/2002, 12 f; *Krajewski,* PiP no 10/1997, 33.

351 See, inter alia, *Radwański/Olejniczak,* Zobowiązania 200.

352 *Radwański/Olejniczak,* Zobowiązania 200; *Machnikowski* in: Olejniczak, System Prawa Prywatnego 415.

353 *Lewaszkiewicz-Petrykowska* in: Studia Prawno-Ekonomiczne 100.

354 *Radwański/Olejniczak,* Zobowiązania 201; *Machnikowski* in: Olejniczak, System Prawa Prywatnego 415. *Dąbrowa* points out that settling for the determination of an infringement of certain rules of proper behaviour alone and passing over the psychological aspect of the perpetrator's behaviour would in fact lead to an objectivisation of liability not really in line with the will of the legislator: *Dąbrowa,* Wina jako przesłanka 212 f.

355 See, inter alia, *Olejniczak* in: Kidyba, Kodeks cywilny, commentary to art 415, no 27.

356 *Radwański/Olejniczak,* Zobowiązania 201; See *Machnikowski* in: Olejniczak, System Prawa Prywatnego 415.

357 See *Machnikowski* in: Olejniczak, System Prawa Prywatnego 415; *Olejniczak* in: Kidyba, Kodeks cywilny, commentary to art 415, no 27.

damaging party should be taken into consideration[358]. *Machnikowski* convincingly argues that account should only be taken of characteristics that have a significant impact on the perpetrator's behaviour and at the same time are permanent in character or easily discernible (age, visible mental or physical disability, visible illness)[359]. It seems, however, that individual traits should not be taken into consideration in the case of professionals. As *Koziol* rightly points out, anyone who exercises an activity requiring special knowledge and powers of reasoning despite lacking the relevant ability creates a source of special danger by so doing also for third parties[360], which justifies the objectivisation of liability.

3/119 As has been pointed out, the boundary between unlawfulness and negligence is somewhat blurred in Polish tort law, mainly due to the fact that the attribution of negligence relies heavily on objective criteria; *Safjan* even speaks of »far-reaching objectivisation« of fault[361]. Courts tend to assume negligence based merely on the fact that certain duties have been breached, especially in the case of professionals[362]. It is, however, beyond doubt that a) only objective criteria are relevant when assessing unlawfulness, b) only unlawful behaviour can be negligent, and c) not all unlawful behaviour is simultaneously negligent.

358 In its decision of 15.2.1971 (III CZP 33/70) the Supreme Court (SN) stated that personal physical or mental characteristics of the perpetrator should not be taken into account when assessing negligence.

359 See, inter alia, *Machnikowski* in: Olejniczak, System Prawa Prywatnego 416.

360 Basic Questions I, no 6/89.

361 *Safjan* in: Pietrzykowski, Kodeks cywilny 1767.

362 See, inter alia, SN judgment of 12.6.2002 (III CKN 694/00, OSN no 9/2003, item 124) concerning tortious liability of a notary, where the SN stated that the mere fact that a notary violated his duties is usually enough to determine fault, at least in the form of negligence (for more on the case, see *E. Bagińska,* Poland, in: H. Koziol/B.C. Steininger [eds], European Tort Law 2003 [2004] 324 f); see also SN judgment of 30.8.1958, 2 CR 772/57, OSP no 11/1959, item 291; SN judgment of 2.12.2003, III CK 430/03, OSNC no 1/2005, item 10, note by *M. Nesterowicz* (OSP no 5/2005, item 21); for more on the case, see *Bagińska* in: Koziol/Steininger, European Tort Law 2005, 458 ff; SN judgment of 1.12.2006 (I CSK 315/06, OSNC no 11/2007, item 169), concerning a breach of duty by an auditor (for more on the case, see *Bagińska* in: Koziol/Steininger, European Tort Law 2007, 459); SN of 13.10.2005 (IV CK 161/05, OSP no 6/2006, item 71), where the SN stated that the breach of a duty to further his professional qualifications on the part of a doctor constitutes fault at least in the form of negligence (for more on the case, see *Bagińska* in: Koziol/Steininger, European Tort Law 2006, 384 ff).

III. Other defects in the damaging party's own sphere

A. Misconduct of persons

3/120 The Civil Code contains special provisions regulating tortious liability for auxiliaries (arts 429 and 430 KC) as well as liability for minors under thirteen years of age and for adults incapable of committing fault (art 427 KC). Liability for others is either based on risk (art 430 KC) or on presumed fault (culpa in eligendo, art 429 KC, or culpa in custodiendo, art 427 KC). What is common to all the listed instances of liability is that responsibility cannot be triggered by the conduct of another person which is not unlawful; this is in line with the rule that the victim does not in principle enjoy any protection against such conduct[363].

3/121 As in Austrian and German law[364], liability for damage caused by children[365] is only imposed on parents and other supervising persons for *their own fault.* In the case of minors under thirteen years of age, art 427 KC introduces a presumption of fault in supervision, as well as of the existence of a causal connection between the improper exercise of supervision and the damage infliction[366]. As mentioned above, in order for the supervising persons' liability to arise, the minor's conduct must be unlawful[367]. If the supervised child has reached the age of thirteen, the parents' (supervising persons') responsibility is based on the general rule of art 415 KC, which means that there is no reversal of the burden of proof and the victim needs to prove all the prerequisites for liability. Liability for damage caused by adults incapable of committing fault due to their mental or physical state is such as for children under the age of thirteen (art 427 KC).

3/122 Before tortious liability for auxiliaries is looked into in more detail, it is worth casting a glance at liability for *performance agents* (Erfüllungsgehilfen), which – like in other legal systems – is far-reaching. Art 474 KC introduces strict liability of the debtor for the acts and omissions of persons who assist him in performing the obligation as well as the persons to whom he entrusts the performance of the obligation. To be precise, the debtor is liable »as for his own actions or omissions«, ie irrespective of his own fault, but, since contractual liability in Polish law is generally for the lack of due diligence (art 471 KC in conjunction with art 472 KC – see no 3/55 above), responsibility under art 474 KC will in principle arise when there is fault consisting in the failure to apply such diligence on the part of the Erfüllungsgehilfe.

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363 Basic Questions I, no 6/96.

364 See Basic Questions I, no 6/98 and the literature cited therein.

365 For more on this issue, see *M. Nesterowicz/E. Bagińska,* Liability for Damage Caused by Others under Polish Law, in: J. Spier (ed), Unification of Tort Law: Liability for Damage Caused by Others (2003) 186 ff.

366 See, inter alia, *A. Szpunar,* Odpowiedzialność osób zobowiązanych do nadzoru (1978) 121, 131.

367 See, inter alia, *A. Śmieja,* Odpowiedzialność odszkodowawcza z tytułu nienależytego sprawowania nadzoru nad małoletnim (1982) 11, 21 ff.

3/123 Tortious liability for persons entrusted with the performance of a task is either based on presumed fault in selection (art 429 KC), or is strict (art 430 KC). Although it is pointed out that the meaning of the term »fault« used in art 429 KC is the same as under art 415 KC[368], a view has also been expressed that »fault in selection« as a basis for liability for auxiliaries differs from »fault« as mentioned in art 415 KC since selection cannot be unlawful in the traditional sense; it can only be incorrect, meaning that a person who is not appropriate to perform a given task has been chosen. Fault in selection therefore consists of two elements: an error in selection and a negative assessment of the selecting person's conduct (a possibility to censure him/her for making the wrong choice in a given situation)[369].

3/124 In order for the entrusting person's liability based on art 429 KC to arise, the auxiliary's conduct must be unlawful[370]. To rebut the presumption of fault in selection, the said person needs to prove either that there is no such fault on his/her part (ie that he/she applied due diligence when appointing the auxiliary), or alternatively that he/she entrusted the performance of a task to a person, an enterprise or an institution that deals with performing such tasks within the limits of their professional activity[371]. The latter option makes it relatively easy to free oneself from liability[372]. Although the wording of art 429 KC suggests its applicability to all instances of entrusting another with the performance of a task, in reality it only applies to cases not covered by art 430 KC[373]. Unlike art 429 KC, art 430 KC introduces liability independent of the entrusting person's fault (strict liability), but dependent on the fault of the auxiliary. It applies solely to cases of damage caused by persons »subject to the supervision of the entrusting person and obliged to abide by his/her guidelines« (dependent auxiliaries; subordinates) and provided that the task has been entrusted *on the principal's own account.* The relationship between art 429 KC and art 430 KC is one of lex generalis versus lex specialis. This means that if all the prerequisites for the application of the latter are fulfilled, the former is not applicable and that, consequently, liability under art 429 KC may arise either in the absence of the relationship of subordination, or when fault can-

368 See, inter alia, *Czachórski* in: Radwański, System Prawa Cywilnego 567.

369 *Machnikowski* in: Olejniczak, System Prawa Prywatnego 445.

370 See, inter alia, *Safjan* in: Pietrzykowski, Kodeks cywilny 1656.

371 The notion of a professional within the meaning of art 429 KC is to be understood narrowly in that the person entrusted with the performance of a task should be a professional with regard to the class of tasks that he/she is entrusted with; *Safjan* in: Pietrzykowski, Kodeks cywilny 1657.

372 See, inter alia, *Czachórski* in: Radwański, System Prawa Cywilnego 569 f. According, however, to the minority view, proving that the performance of a task was entrusted to a professional does not result in the exclusion of liability, but only in reversing the burden of proof, ie in burdening the injured party with proving culpa in eligendo: *Safjan* in: Pietrzykowski, Kodeks cywilny 1656.

373 *Machnikowski* in: Olejniczak, System Prawa Prywatnego 430.

not be attributed to the subordinate[374]. The practical significance of art 429 KC follows mainly from its applicability to cases of independent performance by another[375].The solution provided for by art 430 KC is different from those introduced by the ABGB or by the Austrian Draft[376], but the idea of liability being triggered only if there is a serious defect in the principal's sphere is no doubt present there as well in the form of the prerequisite of the auxiliary's fault. This prerequisite also means that the auxiliary and the principal are jointly and severally liable towards the victim, although an exception to this rule is established in the practically very significant field of employee liability: according to art 120 KP, if an employee causes damage to a third party in the course of exercising his/her duties, it is *the employer alone* who is liable to compensate it[377]. Moreover, unless intentional fault can be attributed to the employee, the employer's recourse against the employee is limited to three times the latter's monthly salary (art 119 KP). Since subordination within the meaning of art 430 is understood broadly (ie as subordination in a general sense, and not as giving actual indications/guidelines)[378], art 430 KC has a wide scope of application and is a provision of great practical importance. To give just one example, professionals from whom creative action is expected and who are independent to a sizeable extent, such as doctors, are also considered to be subordinates within the meaning of art 430 KC[379]. The concept of strict liability for the dependent auxiliary's faulty conduct has been in force in Poland for decades and there are no realistic prospects for a change in the law. The idea that the principal's liability should generally be based on fault in selection or supervision and that no-fault liability is only justified in cases of deploying an *incompetent* auxiliary[380] is unlikely to meet with support in Poland. The reasoning behind this idea is that the auxiliary's lack of aptitude creates a special source of danger and therefore liability without fault is reasonable[381]. The question is, is creating such a special source of danger *necessary* in order to justify the principal's strict liability?

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374 Ibidem 430, 443.

375 *Radwański/Olejniczak,* Zobowiązania 208.

376 See Basic Questions I, nos 6/116, 6/122.

377 The rule according to which the employee is not liable is not applicable if the employer is insolvent; for more on this, see *Nesterowicz* in: Nesterowicz, Czyny niedozwolone 44 and the literature and case law cited therein; *Bagińska* in: Koziol/Steininger, European Tort Law 2010, 471.

378 See, inter alia, *A. Szpunar,* Odpowiedzialność za szkodę wyrządzoną przez podwładnego, in: A. Mączyński/M. Pazdan/A. Szpunar, Rozprawy z polskiego i europejskiego prawa prywatnego. Księga pamiątkowa ofiarowana profesorowi Józefowi Skąpskiemu (1994) 468; *Radwański/Olejniczak,* Zobowiązania 209; SN judgment of 2.12.1975, II CR 621/75, OSP no 6/1977, item 105.

379 *Szpunar,* Czyny niedozwolone 65; *Machnikowski* in: Olejniczak, System Prawa Prywatnego 437; *Radwański/Olejniczak,* Zobowiązania 209 f.

380 Basic Questions I, no 6/122 ff.

381 *H. Koziol/K. Vogel,* Liability for Damage Caused by Others under Austrian Law in: J. Spier (ed), Unification of Tort Law: Liability for Damage Caused by Others (2003) no 4; Basic Questions I, no 6/116.

It is beyond doubt that the fact alone that someone deployed another person in their own interest cannot provide a sufficient basis to burden the principal with *all* damage caused in the course of performance of the entrusted task; in my opinion it should, however, suffice to make him liable for damage caused *culpably* as then the prerequisite of a serious defect within his sphere is met. It seems reasonable that if one deploys another person to perform a task *on one's account* and *under one's influence,* then one should bear the risk of that person acting in a way that generates liability for damage irrespective of whether he/she can be labelled as incompetent (and thus constituting a source of danger). What should matter is that the auxiliary caused damage *in a culpable way,* even if he/she can be described as generally competent (suitable). Why should the injured party bear the risk of an otherwise competent auxiliary acting culpably, and why should the principal be free from liability for such faulty conduct if it is him/her who deployed the auxiliary, is able to control him and moreover profits from his/her activities? To this one could counter that the victim could always claim compensation from the auxiliary him/herself. It is no doubt true, but why should he/she be deprived of the chance to direct his/her claims against another debtor, who initiated the auxiliary's performance which resulted in the damage, and who is usually better off financially? This seems reasonable especially when, as in Poland, the principal who compensated the victim can claim the damages back from the auxiliary.

3/125 Both on the basis of art 429 KC and art 430 KC, the entrusting person is only liable if damage was caused *in the course of* the performance. The interpretation of this concept causes considerable difficulties. It is emphasised that no liability will arise if harm was inflicted only *on the occasion* of the performance[382], that there must be a *functional connection* between the performance and the damage infliction[383], or that liability is only triggered by conduct undertaken *in order to accomplish* the entrusted task[384]. Despite the application of these criteria, however, certain doubts remain as to whether liability should be accepted or rejected in borderline cases.

B. Defective things

3/126 The defective condition of a thing is significant in the case of several instances of strict liability. Apart from the provisions on product liability (arts 449[1] ff KC), two other contexts are worth mentioning in this respect: art 434 KC, which regulates

382 See, inter alia, *Czachórski* in: Radwański, System Prawa Cywilnego 568, 575; *Radwański/Olejniczak,* Zobowiązania 209.

383 *Szpunar,* Czyny niedozwolone 67; *Radwański/Olejniczak,* Zobowiązania 209.

384 *Machnikowski* in: Olejniczak, System Prawa Prywatnego 433.

liability for damage caused by the collapse of a building or the detachment of part of it, as well as arts 435 and 436 KC, concerning respectively the liability of a person running on his own account an enterprise or business set in operation by natural forces and the liability of the possessor of a motor vehicle (or, to be more precise, of a »mechanical means of transport propelled by natural forces«[385]). Art 434 KC introduces no-fault liability of the possessor of a building for the failure to maintain the building in a proper state as well as for a *defect in its construction,* and introduces a presumption that damage resulted from these circumstances. Art 436 KC regulates strict liability of the vehicle possessor, which is only excluded – in accordance with art 435 KC, to which art 436 KC refers – when damage was caused by force majeure, exclusively by the fault of the injured party or exclusively by the fault of a third party for whom the vehicle possessor is not liable. As far as force majeure is concerned, an objective theory has been adopted in Poland, in accordance with which the concept only encompasses *external* events[386]; this rules out defects in a vehicle as excluding the possessor's liability towards the victim. It is universally accepted that all such defects are part of the possessor's risk, ie that he/she cannot free her/himself from liability for these towards the victim[387] even if they are culpably caused by a third party (although of course in the latter case the possessor has a right of recourse against the person liable for the defect). These remarks also pertain to the liability of a person running an enterprise set in operation by natural forces (including, eg, a railway undertaking): failings »internal« to the enterprise, including defects in machinery or equipment, will not result in the exclusion of liability based on art 435 KC[388].

IV. Dangerousness

Dangerousness is an important criterion of imputation, although not one explicitly invoked in any of the provisions establishing strict liability, and also not the only criterion justifying such liability. Polish law does not use the term »liability for dangerousness«. Responsibility based on dangerousness as a criterion for **3/127**

385 Translation by *Bagińska* in: Oliphant/Steininger, Basic Texts 196.

386 See, inter alia, *Warkałło,* Odpowiedzialność 292; for more on the Polish concept of force majeure, see *Radwański/Olejniczak,* Zobowiązania 84; *Ludwichowska,* Odpowiedzialność cywilna 144 ff.

387 For more on this issue, see *Ludwichowska,* Odpowiedzialność cywilna 158 and the literature cited therein.

388 See, inter alia, *Safjan* in: Pietrzykowski, Kodeks cywilny 1676 f. SN of 3.2.1962, IV CR 432/61, OSNC no 1/1963, item 25.

imputation is either described as *liability based on risk* (odpowiedzialność na zasadzie ryzyka), or *absolute liability* (odpowiedzialność absolutna)[389].

3/128 There is no general rule on liability for dangerousness, but individual regulations establishing it instead, and the meaning of »dangerousness« or »increased dangerousness« underlying no-fault liability – or, to be more precise, factors decisive for the recognition of increased dangerousness as a ground for liability – may differ from one instance of liability to another. For example, in the case of art 436 KC, which regulates the liability of the possessor of a motor vehicle, increased dangerousness results mostly from the likelihood of damage infliction[390]; as far as art 433 KC is concerned, which deals with liability for the ejection, effusion or falling of any object from the premises, it is not the likelihood of damage – after all, unlike traffic accidents, incidents involving things falling from buildings do not happen on a daily basis – but the severity of harm which may possibly be caused by things dropping from a certain height[391]; in the case of damage caused by the use of nuclear energy (arts 100 ff of the Atomic Energy Law[392]), what matters is not the likelihood (the probability of nuclear damage is minor), but the extent and severity of possible harm[393].

3/129 The closest that Polish law comes to a general clause in the area of strict liability is art 435 KC[394], which is the equivalent of art 152 KZ, and which does not, as already indicated, expressly refer to increased danger as a ground for imputation, but binds liability to the use of *natural forces*[395]. A broad interpretation of art 435 based on the wording of this provision has led to the expansion of strict liability and to art 435 being applied also in situations where the occurrence of damage does not result from increased danger; a good example is the slipping of a passen-

389 As *Łopuski* rightly points out, the term *absolute* (as opposed to *risk-based)* may only be accepted in the case of liability which cannot be excluded *(Łopuski,* KPP no 3/2004, 676); it cannot therefore be used with regard to any of the instances of strict liability described below.

390 *Ludwichowska,* Odpowiedzialność cywilna 114 f.

391 See, inter alia, *Śmieja* in: Olejniczak, System Prawa Prywatnego 508.

392 Prawo atomowe. Act of 29.11.2000, consolidated text Dz U 2014, item 1512.

393 See, inter alia, *Z. Gawlik,* Odpowiedzialność cywilna za szkody wyrządzone pokojowym wykorzystaniem energii atomowej, NP no 2-3/1988, 12.

394 Art 435 § 1 A person conducting on his own account an enterprise or business set into operation by natural forces (steam, gas, electricity, liquid fuel, etc) is liable for any damage to persons or property caused through the operation of the enterprise or business, unless the damage was caused by force majeure or exclusively by the fault of the injured party or of a third person for whom he is not liable. § 2 The above provision shall apply correspondingly to enterprises or businesses producing or using explosives (translation by *Bagińska* in: Oliphant/Steininger, Basic Texts 196).

395 In order for liability to arise there must be a causal connection between the damage and the functioning of the enterprise as a whole; a direct relationship between the use of natural forces and the harm caused is not necessary; see, inter alia, *Safjan* in: Pietrzykowski, Kodeks cywilny 1676; *Radwański/Olejniczak,* Zobowiązania 240 f.

ger on a platform[396]. *Łopuski* critically evaluates the reference to the use of natural forces as a criterion justifying no-fault liability and points out that, currently, human activities generating danger go far beyond those specified in art 435 KC[397]. He is in favour of introducing a direct reference to danger, and more precisely to devices or technologies creating danger in art 435 KC[398].

3/130 The defences to liability for dangerousness known to Polish tort law are: force majeure, the fault of the injured party which is the exclusive cause of damage as well as the fault of a third party which is the exclusive cause of damage. All three and solely these three operate as circumstances exempting from liability based on art 433 KC, art 435 KC and art 436 KC. In the case of art 434, the catalogue of exonerating circumstances is broader and undefined: since the possessor is liable solely for the failure to maintain the building in a proper state and for a construction defect (or, to put it differently, since his strict liability is limited to the two circumstances), he will be exonerated not only if he proves that damage was caused by force majeure, exclusively by the fault of the injured party or exclusively by the fault of a third party, but also if he manages to demonstrate that it resulted from any other cause for which he is not liable[399]. Liability for nuclear damage is stricter as it is only excluded if there is intentional fault on the part of the victim or if damage is caused by a special instance of force majeure, namely warfare or armed conflict.

3/131 Contributory responsibility of the victim is a defence leading to the reduction of damages also in the area of risk-based liability (see no 3/140 ff below).

3/132 The injured party's consent will by no means always lead to the exclusion of liability based on dangerousness. In accordance with art 437 KC, the liability regulated in arts 435 and 436 KC cannot be excluded or limited in advance. Moreover, a person cannot effectively consent to personal injury if the perpetrator's conduct is unlawful; such consent would be considered contrary to the principles of community life (art 58 § 2 KC)[400].

3/133 Dangerousness is important not only when introducing a provision establishing no-fault liability; it may also be crucial when determining the scope of its application. For example, increased dangerousness is vital for the interpretation of the concept of *motion* of a motor vehicle, which is one of the prerequisites of

396 *Łopuski,* KPP no 3/2004, 683 f.

397 *Łopuski,* KPP no 3/2004, 672. *Łopuski* emphasises that increased danger may be created by the functioning of entities other than those listed in art 435 KC as well as by activities different from those consisting in the use of natural forces (at 683) and also indicates that the risk generated depends on the way natural forces are used, which should be taken into account when regulating liability (at 692).

398 He also points out that instead of strict liability, such a general norm could introduce a presumption of fault or a presumption of liability; *Łopuski,* KPP no 3/2004, 694.

399 *Safjan* in: Pietrzykowski, Kodeks cywilny 1672; *Radwański/Olejniczak,* Zobowiązania 236.

400 *M. Nesterowicz/E. Bagińska,* Strict Liability under Polish Law, in: B.A. Koch/H. Koziol (eds), Unification of Tort Law: Strict Liability (2002) 268.

liability based on art 436 KC. It is through the application of this criterion that Polish courts have extended the concept of »motion« to vehicles not moving in a physical sense[401].

3/134 The Polish Civil Code does not restrict liability for dangerousness by imposing monetary limits on compensation.

V. Permitted interference

3/135 The most important example of a situation where the legal system allows for an interference with third-party goods against compensation for the damage inflicted is art 142 KC, which prohibits the owner from opposing the use or even the damaging or destruction of a thing by another person if it is necessary to ward off an impending danger which directly jeopardises the personality rights[402] of that person or of a third party; the owner may, however, demand the redress of damage resulting therefrom. The same applies in the case of danger jeopardising property interests, unless the impending damage is obviously and disproportionately smaller than the loss which the owner might suffer as a result of the use, damaging or destruction of the thing. As *Koziol* emphasises, in such cases the owner is denied defensive rights, but his interests are still protected by a claim for damages[403].

VI. Economic capacity to bear the burden

3/136 Polish tort law takes into account financial circumstances in the case of liability based on the principles of equity as well as in situations where a natural person has a duty to redress damage caused to another natural person (art 440 KC). The former arises only by way of exception and solely in cases provided for by statute. The provisions establishing such liability are art 417^2 KC (liability for personal injury caused by the lawful exercise of public authority), art 428 KC (liability of persons under the age of responsibility as well as of those incapable of committing fault due to their mental or physical state in situations where there are no persons obliged to exercise supervision or it is not possible to obtain compensation from these persons) and art 431 § 2 KC (liability of persons who keep or use an animal

401 For more on this issue, see *Ludwichowska,* Odpowiedzialność cywilna 134 ff.

402 The provision speaks of jeopardising »dobra osobiste«; on the notion of »dobra osobiste« see FN 31 above.

403 Basic Questions I, no 6/161.

to whom fault in supervision, which is the prerequisite of liability for damage caused by animals in Polish law, cannot be attributed, and who are consequently not liable based on art 431 § 1 KC). In the first case, the injured party may demand compensation for personal injury (or, more precisely, full or partial compensation of pecuniary loss as well as compensation for non-pecuniary harm) caused by the *lawful* exercise of public authority *if the circumstances of the case, and in particular the victim's incapacity to work or his/her difficult financial situation, indicate that equity considerations require such compensation.* In the latter two situations, full or partial compensation may be claimed by the injured party *if it follows from the circumstances of the case, and in particular from the comparison of the financial situation of the victim and the perpetrator or the person keeping or using the animal that the principles of community life so require;* compensation may, however, only be awarded if the damage was caused *unlawfully*[404].

3/137 Art 440 KC states that in relations between *natural persons* the extent of the duty to redress damage may be limited (but not excluded!)[405] in accordance with the circumstances, provided that such limitation is required by the principles of community life in view of the financial situation of the injured party or of the person liable for damage. It must be emphasised that financial circumstances are not the only factor taken into account and that regard must be had to the principles of equity, which is why a limitation of compensation will not be permitted, eg, if there is serious fault on the part of the perpetrator[406]. In accordance with established case law, art 440 KC is not applicable if the person obliged to redress damage has third-party liability insurance[407] as the existence of insurance cover influences his financial situation[408].

VII. Realisation of profit

3/138 The view that a person drawing profits from a particular thing or activity which is a source of risk should also bear the burden of damage caused by them (eius damnum cuius commodum) is one of the justifications for risk-based liability[409].

404 *Radwański/Olejniczak,* Zobowiązania 207; *Safjan* in: Pietrzykowski, Kodeks cywilny 1665.

405 See, inter alia, SN judgment of 4.2.1970, II CR 527/69, OSNC no 11/1970, item 202; SN judgment of 15.7.1977, IV CR 263/77, OSNC no 4/1978, item 74.

406 See, inter alia, *A. Szpunar,* Odszkodowanie za szkodę majątkową 104; SN of 19.12.1977, II CR 469/77, OSNCP no 10/1978, item 183.

407 See, inter alia, SN of 18.12.1968, II CR 409/68, OSP no 11/1969, item 207.

408 *Szpunar,* Odszkodowanie za szkodę majątkową 105; *Ludwichowska,* Odpowiedzialność cywilna 303.

409 See, inter alia, *B. Lewaszkiewicz-Petrykowska,* Odpowiedzialność cywilna prowadzącego przedsiębiorstwo wprawiane w ruch za pomocą sił przyrody (art 435 KC) (1965) 31.

VIII. Insurability and actual insurance cover

3/139 Insurability is undoubtedly a factor justifying the introduction of liability independent of fault[410]. As for actual insurance cover, it only encompasses existing liability and cannot serve as a justification for establishing a duty to pay damages, although it has been observed to have a psychological effect on judges and make them more prone to impose liability or expand its scope (eg in the case of compulsory motor third-party liability insurance)[411]. It must also be noted that in the field of liability based on equity the fact that the perpetrator is insured against civil liability should be taken into account when assessing his/her financial situation, which is a crucial circumstance in the course of determining whether compensation should be awarded to the victim (see no 3/137 above)[412].

IX. Contributory responsibility of the victim

3/140 Contributory responsibility of the victim is regulated in art 362 of the Civil Code, which states that »if the injured party contributed to the occurrence or aggravation of damage, the duty to redress it will be correspondingly reduced in accordance with the circumstances, and in particular with the degree of both parties' fault.« Unlike the Code of Obligations, which treated the victim's contributory conduct as entailing a reduction of *damages* (art 158 § 2 KZ), the Civil Code speaks of a reduction of a *duty to compensate.* Art 362 KC has given rise to various interpretations, and the issue of the victim's contributory conduct is still not fully resolved in Polish law[413]. There are four proposed interpretations of art 362 KC; the first one assumes that the victim has contributed to the occurrence or aggravation of damage if his/her conduct is in a causal connection with the damage[414]. In accordance with the second interpretation, causation alone is not sufficient and must be accompanied by the victim's objective misconduct[415]; both these theories could be

410 See, inter alia, *E. Kowalewski,* Wpływ ubezpieczenia odpowiedzialności cywilnej na odpowiedzialność z tytułu czynów niedozwolonych, Acta Universitatis Nicolai Copernici no 181 (1988) 83; *Pajor,* Przemiany w funkcjach 307.

411 *Kowalewski,* Wpływ 89 f.

412 *Szpunar,* Odpowiedzialność osób zobowiązanych do nadzoru 158.

413 See also *Bagińska* in: Koziol/Steininger, European Tort Law 2009, 486.

414 See, inter alia, *S. Garlicki,* Odpowiedzialność cywilna za nieszczęśliwe wypadki (1971) 399.

415 *T. Dybowski,* Przyczynowość jako przesłanka odpowiedzialności (zagadnienia wybrane), NP no 1/1962, 41; *E. Łętowska,* Przyczynienie się małoletniego poszkodowanego do wyrządzenia szkody, NP no 2/1965, 135.

described as variations of the theory of differentiation (Differenzierungsthese)[416]. The third interpretation considers the victim's conduct contributory when it is causal and at the same time culpable[417]. And finally, the fourth theory, which touches to a certain extent upon the equal treatment theory (Gleichbehandlungsthese), makes the assessment dependent on the basis of the tortfeasor's liability: if the liability is fault-based, there must be fault on the part of the victim in order for his/her conduct to be treated as contributory, and if it is risk- or equity-based, objective inappropriateness of the victim's behaviour is sufficient[418]. Here it must be emphasised that in Polish law only the *conduct* of the injured party may result in his contributory responsibility, and not events beyond his control[419].

3/141 There is no unanimity in the case law or doctrine as to which theory is most appropriate in the light of art 362 KC, but an observation may be made that the second and fourth interpretations have found more followers[420]. According to established case law concerning arts 435 and 436 KC, if the tortfeasor's liability is risk-based, damages may be reduced even when fault cannot be attributed to the victim; in such cases, the injured party's objectively inappropriate behaviour is sufficient[421]. This means that minors below the age of responsibility as well as the mentally unstable may contribute to the existence or aggravation of damage within the meaning of art 362 KC.

3/142 A view has also been expressed which, although not in line with the wording of art 362 KC[422], is gaining increasing support both in case law and in the relevant literature, to the effect that the victim's contribution to the damage suffered should be understood as all of his/her conduct that is in an adequate causal connection with the inflicted damage, but that such contribution does not result in the court's

416 See Basic Questions I, no 6/208.

417 *A. Ohanowicz,* Zobowiązania – część ogólna (1965) 98.

418 *A. Szpunar,* Wina poszkodowanego w prawie cywilnym (1971) 93 f, 116 ff; *J. Senkowski,* Pojęcie przyczynienia się poszkodowanego do szkody, NP no 1/1968, 50 ff.

419 See *Kaliński* in: Olejniczak, System Prawa Prywatnego 183 and the SN judgment of 13.1.1997 (I PKN 2/97, OSNP no 18/1997, item 336) cited there; see also SN of 5 May 2011, II PK 280/10, LEX no 1095825.

420 *M. Nesterowicz/E. Bagińska,* Contributory Negligence under Polish Law, in: U. Magnus/M. Martín-Casals (eds), Unification of Tort Law: Contributory Negligence (2004) 150.

421 SN judgment of 20.1.1970, II CR 624/69, OSNC no 9/1970, item 163; SN judgment of 3.6.1974, II CR 786/73, LEX no 7509; SN judgment (panel of 7 judges) of 20.9.1975, III CZP 8/75, OSNCP no 7/1976, item 151; SN judgment of 18.3.1997, I CKU 25/97, Prokuratura i Prawo no 10/1997, item 32. Critically on this, see inter alia, *T Pajor* (Uwagi o przyczynieniu się poszkodowanego do powstania szkody, in: M. Pyziak-Szafnicka [ed], Odpowiedzialność cywilna. Księga pamiątkowa ku czci Profesora Adama Szpunara [2004] 162), who stresses that in particular liability for traffic accidents should not be limited if fault cannot be attributed to the injured party. See also *M. Nesterowicz/K. Ludwichowska,* Odpowiedzialność cywilna za szkodę wyrządzoną przez ruch pojazdu mechanicznego (zasady, przesłanki, granice), in: E. Kowalewski (ed), Odszkodowanie za niemożność korzystania z pojazdu uszkodzonego w wypadku komunikacyjnym (2011) 27 f.

422 See, inter alia, *Pajor* in: Pyziak-Szafnicka, Odpowiedzialność cywilna 160.

duty to limit compensation; whether a limitation should take place depends on the »circumstances of the case«[423].

3/143 The most important circumstance taken into account in the course of assessment of whether an apportionment of damage should take place, and the only one explicitly mentioned in art 362 KC, is the degree of fault of both parties[424]. Other criteria are: the degree of contribution; the degree to which objective rules of conduct have been infringed by the parties; the motives which drove the victim to undertake the damaging conduct (eg altruistic motivation)[425]. It is emphasised that all circumstances in casu should be taken into consideration and that the assessment needs to be individualised[426]. In other words, it is the weighing up of all the relevant factors in a given case that is decisive for the question of damage apportionment. It has been pointed out that mere causation by the victim's conduct may lead to a limitation of compensation even if there is fault on the part of the tortfeasor, provided that the degree of the victim's contribution is very high while the perpetrator's fault is only slight[427]. If, on the other hand, the injured party's contribution is slight and there is intention on the part of the tortfeasor, compensation will not be limited[428]; the same applies to a situation where the victim was negligent while the tortfeasor acted with intent[429].

3/144 Like in the Germanic systems, the contributory conduct of the victim is also counted against the claims of persons entitled to compensation in the case of the victim's death[430].

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423 See, inter alia, *T. Dybowski,* W sprawie przyczynienia się poszkodowanego do powstania szkody (przyczynek do dyskusji nad treścią art 362 KC), NP no 6/1977; *Banaszczyk* in: Pietrzykowski, Kodeks cywilny 1348; *M. Owczarek,* Zmniejszenie odszkodowania na podstawie art 362 KC, Monitor Prawniczy (MoP) no 4/2003, 160 ff; *Kaliński* in: Olejniczak, System Prawa Prywatnego 184; SN of 29.10.2008, IV CSK 228/08, Orzecznictwo Sądu Najwyższego. Izba Cywilna – Zbiór Dodatkowy (OSNC ZD) C/2009, item 66, commented by *Bagińska* in: Koziol/Steininger, European Tort Law 2009, 483 ff; SN of 19.11.2009, IV CSK 241/09, LEX no 677896.

424 The fault of the injured party is naturally understood differently than the tortfeasor's fault, that is, in a nutshell, as a censurable failure to exercise due care in one's own affairs (see, inter alia, *Szpunar,* Wina poszkodowanego 76; *Radwański/Olejniczak,* Zobowiązania 244). Unlawfulness is neither a prerequisite nor an element of the victim's fault. In most cases the injured party's behaviour will not be unlawful since there is no general duty not to cause damage to oneself. As *Koziol* points out, due to the absence of wrongfulness, contributory fault is significantly less substantial than real fault (Basic Questions I, no 6/217).

425 *Radwański/Olejniczak,* Zobowiązania 100; *Banaszczyk* in: Pietrzykowski, Kodeks cywilny 1350.

426 See, inter alia, SN of 19.11.2009, IV CSK 241/09, LEX no 677896.

427 *Dybowski* in: Radwański, System Prawa Cywilnego 300. *Pajor* points out that any »objectively improper« behaviour of the injured party could lead to a limitation of the duty to compensate provided that the torfeasor is only liable for slight negligence *(Pajor* in: Pyziak-Szafnicka, Odpowiedzialność cywilna 162).

428 *Dybowski* in: Radwański, System Prawa Cywilnego 300.

429 *Szpunar,* Wina poszkodowanego 13; *Pajor* in: Pyziak-Szafnicka, Odpowiedzialność cywilna 162.

430 See, inter alia, SN judgment of 12.7.2012, I CSK 660/11, LEX no 1228769; *Safjan* in: Pietrzykowski, Kodeks cywilny 1743. Cf Basic Questions I, no 6/220.

Article 362 KC is also applicable in cases where it is not the victim him/herself who contributed to the damage suffered, but persons for whom he/she is liable based on the provisions establishing liability for others. In other words, the victim is burdened with the consequences of the conduct of persons for whom he/she would be liable if they caused damage to a third party[431]. As *Kubas* points out, the tortfeasor should not be worse off in cases where there is contribution to the damage on the part of persons who act in the injured party's interest, or who remain under his/her supervision or control[432]. **3/145**

431 *A. Kubas,* Zachowanie osób trzecich jako przyczynienie się poszkodowanego, Studia Cywilistyczne 1976, vol XXVII, 25; *Kaliński* in: Olejniczak, System Prawa Prywatnego 190; *Banaszczyk* in: Pietrzykowski, Kodeks cywilny 1352; *Koch,* Związek przyczynowy 253 f; *Nesterowicz/Bagińska* in: Magnus/Martín-Casals, Unification of Tort Law: Contributory Negligence 157.

432 *Kubas,* Zachowanie 25.

Part 7 Limitations of liability

3/146 It is beyond doubt in Polish law too that making the liable party responsible for all the harm for which the event triggering his/her liability was a condition would be unreasonable[433]; instruments are therefore applied that set limits to liability for damage. These will be examined below.

I. Interruption of the causal link?

3/147 The concept of an »interruption of the causal link« is known to Polish law, although, as *Koziol* points out invoking *Stark* and *Oftinger,* it can only be examined in the context of adequacy[434]. As is indicated by *Koch,* if an event (nova causa interveniens) appears in the causal chain which constitutes a conditio sine qua non of the damage inflicted, but which is not a normal result of a given cause, the consequences of this event cannot be attributed to the cause, which means that liability for the latter only encompasses consequences which appeared before said event[435]. *Koch* admits that the term »interruption of a causal link«, employed also by the Supreme Court[436], is a metaphor but claims that it is tempting to use it as it is one that reflects the situation well[437].

II. Adequacy

3/148 The theory of adequacy is a theory of causation in Polish law (see no 3/77 above)[438]; here it must be emphasised once again that causation is considered to fulfil a double function: it is both a prerequisite of liability and a factor setting the limits thereof. The criterion of adequacy finds its legal basis in art 361 § 1 KC, which states that the person obliged to pay damages is liable only for the *normal* consequences of the act or omission from which the damage resulted.

433 Basic Questions I, no 7/2.
434 Basic Questions I, no 7/6.
435 *Koch,* Związek przyczynowy 272.
436 See, inter alia, SN of 3.2.1971, III CRN 450/70, OSNC no 11/1971, item 205.
437 *Koch,* Związek przyczynowy 272 f.
438 Cf Basic Questions I, no 7/7.

3/149 The prevailing view is that an adequate causal connection within the meaning of art 361 § 1 KC is an objective category and that consequently the *normality* of consequences cannot be treated as their *predictability*[439], the latter criterion being associated with the question of fault[440]. It has, however, been questioned in the relevant literature whether a complete rejection of the »predictability« benchmark is appropriate and whether it would not lead to inequitable results[441]. Damage is deemed to be a normal consequence of an event when it results from that event in the normal course of things[442]. As *Koch* emphasises, it is characteristic for the theory of adequacy that it treats as legally relevant only those conditions that increase the likelihood of the occurrence of damage[443]. A normal consequence is therefore a consequence that ensues usually, predominantly, as a rule (which does not mean always)[444] as a result of a given event[445]. In the course of determining whether a consequence is normal within the meaning of art 361 § 1 KC, courts must take into account, inter alia, the state of knowledge in a given field as well as objective criteria resulting from life experience and achievements of science[446].

3/150 Although a view has been expressed to the effect that where a provision lists specific exonerating circumstances such as force majeure, exclusive fault of a third party or exclusive fault of the injured party (eg arts 433, 435, 436 KC) it suffices that a given event is a conditio sine qua non for the damage[447], the prevailing – and correct – opinion is that art 361 § 1 KC regulates the causal connection as a prerequisite of *any* liability for damage, irrespective of whether it is fault-based or strict[448]. It is consequently emphasised that an exception to the requirement of adequacy must be introduced by an explicit legal provision[449]. Examples of such are Civil Code provisions introducing liability for a so-called casus mixtus (arts 478, 714, 739, 841 KC), ie imposing responsibility also for accidental consequences of the perpetrator's conduct that would not have ensued if he/she had

439 It is emphasised that predictability (foreseeability) is tied with the prerequisite of fault even if it is perceived in the abstract (objective) sense, that is as the possibility to foresee a given result by an average, reasonable person; see *Koch,* Związek przyczynowy 130; *Jastrzębski,* PS no 7-8/2004, 37.

440 SN 10.12.1952, C 584/52, PiP no 8-9/1953, 366.

441 *Nesterowicz* in: Nowicka, Prawo prywatne czasu przemian 192.

442 See, inter alia, SN of 27.11.2002, I CKN 1215/00, OSP no 11/2004, item 139, note by *A. Koch*.

443 *Koch,* Związek przyczynowy 136.

444 SN judgment of 10.12.1952, C 584/52, PiP no 9/1953, 366.

445 *Nesterowicz* in: Nowicka, Prawo prywatne czasu przemian 191.

446 See, inter alia, SN judgment of 11.9.2003, III CKN 473/01, MoP no 17/2006, 947.

447 *Dybowski* in: Radwański, System Prawa Cywilnego 269 f; *Safjan* in: Pietrzykowski, Kodeks cywilny 1676.

448 *Lewaszkiewicz-Petrykowska,* Odpowiedzialność cywilna 69; *Łopuski,* KPP no 3/2004, 687; *Czachórski,* Prawo zobowiązań 277; *Ludwichowska,* Odpowiedzialność cywilna 142.

449 *Łopuski,* KPP no 3/2004, 687; *Radwański/Olejniczak,* Zobowiązania 87.

acted lawfully[450]. A deviation from the principle of adequacy is also accepted in cases of intention (no 3/114 above): it is pointed out that if the perpetrator's intent embraces abnormal consequences, so should his/her liability.

III. The protective purpose of the rule

A. In general

3/151 In Polish tort law the idea of the protective purpose of the rule is embraced by the concept of relative wrongfulness[451]. According to *Szpunar,* a rule protects certain interests and it is only the infringement of these interests that is unlawful[452]. This view is shared, inter alia, by *Lewaszkiewicz-Petrykowska*[453]. The usefulness of the concept of relative wrongfulness, the application of which is considered to lead to a limitation of the extent of compensable damage as determined in accordance with the theory of adequacy[454], is, however, also questioned in the relevant literature[455]. *Safjan* points out that since the theory of relative wrongfulness is traditionally tied to contractual liability, the prerequisite for which is the violation of obligations burdening the debtor in relation to the creditor and not an infringement of the universal rules of proper conduct, it remains in opposition to the ideas underlying the concept of tort in the light of art 415 KC[456]. He also claims that it seems to lead to confusion between the prerequisites of liability as it enters into the realm of causation, and more specifically deals with questions resolved on the basis of the theory of adequacy[457]. It has been pointed out that the aims fulfilled by the concept of relative wrongulness may be reached by an appropriate ap-

450 See, inter alia, *Banaszczyk* in: Pietrzykowski, Kodeks cywilny 1333.

451 *Koch,* who emphasises that it is a theory of wrongfulness and not of causation, questions its usefulness in Polish law *(Koch,* Związek przyczynowy 114 f).

452 *A. Szpunar,* Note on SN judgment of 3.3.1956, 2 CR 166/56, OSPiKA no 7-8/1959, item 197, 382. *Szpunar* also states that compensation may only be claimed by the person whose interests are protected by the norm (ibidem).

453 *Lewaszkiewicz-Petrykowska* in: Studia Prawno-Ekonomiczne 91. The concept of the protective purpose of the rule is also supported by *Kasprzyk,* who emphasises both the personal scope of protection and the subject matter protective scope: *R. Kasprzyk,* Bezprawność względna, SP no 3/1988, 149 ff.

454 *Kaliński* in: Olejniczak, System Prawa Prywatnego 58.

455 See, inter alia, *Czachórski/Brzozowski/Safjan/Skowrońska-Bocian,* Zobowiązania 210; *M. Owczarek,* Problem bezprawności względnej w systemie odpowiedzialności deliktowej, Palestra no 5-6/2004, 36 ff.

456 To this it is rightly countered that the universal character of duties stipulated by tort law provisions relates only to the potential infringer, and that it does not mean that a given norm cannot protect the interests of only certain persons *(M. Kaliński,* Szkoda na mieniu [2008] 121).

457 *Safjan* in: Ogiegło/Popiołek/Szpunar, Rozprawy prawnicze 1325 f.

proach to causality, and more precisely by examining whether a causal connection exists between the damage and the element of damage-causing conduct which is decisive for classifying the conduct as wrongful[458]. The correctness of such an approach, which involves splitting the damaging event and singling out the part of it deemed to be decisive for determining wrongfulness has, however, been questioned[459]. The critics of relative wrongfulness also indicate that difficulties arise when the purpose of the infringed norm is not sufficiently specified[460], but it is countered that these are usually possible to overcome[461].

B. The special problem of lawful alternative conduct

3/152 Unlike in the Germanic systems, lawful alternative conduct has not been widely discussed in Polish literature or dealt with in depth by case law. The problem of such conduct is either regarded as a case of hypothetical causation[462], or considered in the context of wrongfulness[463]. In a judgment of 14 January 2005[464], referred to under no 3/94 above and concerning unlawfully conducted enforcement proceedings[465], the Supreme Court stated that lawful alternative conduct cannot lead to an exemption from liability *if the perpetrator's actual conduct violated a norm intended to prevent damage for which he is to be made liable,* as otherwise the guarantee function of this norm would be undermined[466]. The facts of the case were as follows: the claimant obtained three bank loans, all of which he failed to pay back. The bank therefore issued three enforcement orders, of which only one had a (legally required) writ of execution appended. A bailiff not only conducted enforcement proceedings based on this order, but also partially enforced the other two debts. The claimant requested the return of the amounts collected from him on the basis of unlawfully conducted enforcement proceedings. The Court of Appeals denied liability with the justification that although the bank enforced two of the claimant's debts in violation of the law, it did not cause him any damage but only a reduction of his indebtedness. The Supreme Court, however, reversed this judgment and stated that unlawfully conducted enforcement proceedings cannot result in diminishing the claimant's debts. It held that the de-

458 *M. Owczarek,* Palestra no 5-6/2004, 43 ff.
459 *M. Kaliński,* Szkoda na mieniu (2008) 119.
460 Ibidem 118.
461 *M. Kaliński* in: A. Olejniczak (ed), System Prawa Prywatnego 58.
462 See no 3/94 above.
463 *Kaliński* in: Olejniczak, System Prawa Prywatnego 144.
464 III CK 193/04, OSP no 7-8/2006, item 89.
465 For more on the case, see *Bagińska* in: Koziol/Steininger, European Tort Law 2006, 374 ff.
466 See the grounds for the judgment of 14.1.2005.

fendant cannot be released from liability based on the fact that the same damage would have ensued in the case of lawful proceedings. The Court did not examine the issue of lawful alternative behaviour in depth and failed to provide a more extensive justification for its decision, which makes it difficult to properly analyse its approach. If the judgment's wording alone is anything to go by, it indicates a focus on the result, since the Supreme Court speaks of rules intended to *prevent damage* and not rules aimed at preventing damage *being caused in a certain way/by a certain behaviour*[467]. Whether a clear distinction between one and the other is possible, and whether the legal consequences of breaching a rule should be different in each case, is another matter[468], and one that the Court appears not to have had under consideration. On the other hand, however, in the case at hand the SN refused to accept the defence of lawful alternative behaviour in a situation where *procedural norms* were infringed, and held that admitting this defence would »undermine the guarantee function of the violated provisions«. The message that the Court's reasoning seems to convey is that the infringed norm is there not to prevent the result; the result as such – transferring money from the claimant to the defendant, where it belongs, thereby reducing the former's debts – is in fact desired, but only provided that it is achieved following certain procedures, which safeguard the claimant's interests. All in all, and notwithstanding the exact wording of the judgment conclusion, the approach taken by the Supreme Court seems consistent with the view that the defence of lawful alternative conduct does not lead to exemption from liability if the violated rule's aim is not so much preventing damage, but doing away with certain types of behaviour[469].

3/153 *Kaliński* points out that where there is no infringement of a norm aimed at preventing the damage that was inflicted in a given case, there is no *relative wrongfulness* (assuming that one accepts the concept of relative wrongfulness – comment KLR), and consequently liability cannot arise not because of the defence of lawful alternative conduct, but due to the fact that the prerequisite of wrongfulness has not been fulfilled[470].

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467 Cf Basic Questions I, no 7/25 f.

468 Extensively on this Basic Questions I, nos 7/25 f, 7/31.

469 Basic Questions I, no 7/26. Approving of this approach *Jastrzębski,* who stresses that when establishing liability one should not pass over the protective purpose of the rule and the fact that damage was inflicted in the very way that the violated norm was intended to prevent. He points out that marginalizing procedural guarantees (even if only in the course of establishing liability for damage) would undermine the integrity of the legal system (note on the judgment of 14.1.2005, III CK 193/04, OSP no 7-8/2006, item 989, 423).

470 *Kaliński* in: Olejniczak, System Prawa Prywatnego 144.

IV. Intervening wilful act by a third party or by the victim

Intervening acts of third parties are looked at in the context of adequacy. The occurrence of such an act may be regarded as *interrupting a normal causal link*[471] – an expression the Supreme Court is known to employ in its case law[472]. As is emphasised, inter alia, by *Dybowski,* if apart from a given cause another event contributed to the occurrence of a (damaging) consequence, which other event is not a normal consequence of the first event, then the second event determines the limit of liability from the point of view of causality[473]. This refers not only to deliberate, but also to negligent conduct. For example, the faulty repair of a car damaged in a traffic accident, which made corrections necessary, was regarded by the Supreme Court as a factor interrupting the causal link between the accident and the state of the car after repairs[474]. In another judgment, the Court stated that the person who caused a fire was not responsible for the results of a second fire, which broke out some time after the first one because the fire brigade negligently failed to cut off the supply of electricity from the affected building. The Court held that in this case *the normal causal connection was interrupted* and that the second fire *was not a normal consequence of the action or omission of the person responsible for the first fire*[475]. **3/154**

When harm is brought about by a decision of the victim, the question of its imputability will be determined in accordance with art 362 KC, which deals with the injured party's contribution to both the *occurrence* and the *aggravation* of damage (see no 3/140 above). *Banaszczyk* stresses that the victim's contribution cannot under any circumstances justify a refusal to award damages[476]; a different view is presented by *Granecki,* who holds that if the injured party *intentionally* contributed to the *occurrence* of damage, compensation should be refused[477]. **3/155**

V. Limits of liability

In Polish tort law, as in many other systems, there are no limits on the amounts awarded in the field of strict liability based on dangerousness. **3/156**

471 See no 3/147 above.
472 See, inter alia, *Nesterowicz* in: Nowicka, Prawo prywatne czasu przemian 198 ff.
473 *Dybowski* in: Radwański, System Prawa Cywilnego 261.
474 SN of 3.2.1971, III CRN 450/70, OSNC no 11/1971, item 205.
475 SN of 23.4.1974, II CR 146/74, OSP no 2/1975, item 37.
476 *Banaszczyk* in: Pietrzykowski, Kodeks cywilny 1350.
477 *P. Granecki,* Zasada bezwzględnej odpowiedzialności za szkodę wyrządzoną umyślnie (według kodeksu cywilnego), SP no 3-4/2000, 80.

Part 8 The compensation of damage

I. Extent of compensation

3/157 The extent of compensation is determined by the principle of full restitution, expressed in art 361 § 2 KC, in accordance with which compensation encompasses both damnum emergens and lucrum cessans (see no 3/48 above). In order for the latter to be compensable, a high degree of probability is sufficient; to be precise, it must be reasonable to assume that the profit would really have been gained[478].

3/158 The principle of comprehensive compensation is not valid in the field of liability based on equity (arts 417², 428, 431 § 2 KC), where the Civil Code entitles the injured party to *full or partial* compensation (see no 3/136 above) or in employer-employee relationships, since the liability of the latter towards the former is limited to three times the monthly salary unless there is intent on the employee's part (see no 3/48 above).

3/159 The principle of full restitution is also subject to restrictions, which have been dealt with above. Firstly, not all harm will be compensated, but only such as is in an adequate causal connection with the damage-causing event, save when the tortfeasor is liable for intent, as in this case he/she is also deemed responsible for the abnormal consequences of his/her conduct (see above nos 3/148 ff; 3/114). Other instruments restricting the scope of protection of tort law provisions are the concept of *relative wrongfulness,* embodying the theory of the protective purpose of the rule (no 3/151 above), and, linked with this concept, the generally accepted principle that *the law only allows for the reparation of losses suffered by the direct victim* (no 3/102 above). Regard must also be had to the rules governing contributory responsibility of the victim (art 362 KC) as well as to the possibility of reducing damages in relations between natural persons (art 440 KC). A restriction in the form of a de minimis threshold is provided by product liability law.

II. Types of compensation

3/160 Unlike in the Germanic systems, in Poland the injured party has a right to choose between monetary compensation and restoration of the previous state. Only when

478 See, inter alia, SN of 21.6.2001, IV CKN 382/00, LEX no 52543.

the restoration is impossible or would entail excessive hardships or costs for the liable party is remuneration in money the only option (art 363 § 1 KC). As for the possibility of combining the two types of compensation, the correct – although not undisputed – view seems to be that it is possible to claim damages when natural restitution does not provide full compensation to the injured party[479]. This has been confirmed, inter alia, by Supreme Court judgments concerning car accident damage, in which the Court stated that if in spite of repairs the damaged car has not been fully restored to its previous condition, the injured party is entitled to additional monetary compensation. The Supreme Court has also confirmed the compensability of loss of commercial value[480].

III. Periodic or lump sum

Polish law provides for compensation in the form of periodical payments instead of a lump sum in cases regulated in art 444 § 2 (bodily injury or a health disorder) as well as art 446 § 2 KC (death of a person burdened with a maintenance duty or voluntarily providing a means of subsistence to another person). Non-pecuniary loss cannot be compensated by means of an annuity. An annuity once awarded may be adjusted to take account of changed circumstances (art 907 § 2 KC). **3/161**

In accordance with art 444 § 2 KC, if the injured party has lost his/her working capacity, wholly or partially, if his/her needs have increased or if his/her prospects for the future have deteriorated, he/she may claim an appropriate annuity from the person obliged to redress the damage. If at the time of the judgment the damage cannot yet be accurately assessed, a temporary annuity may be granted (art 444 § 3 KC). Art 446 § 2 states that a person entitled by statute to support from the deceased may claim, from the person obliged to redress the damage, an annuity assessed according to the needs of the injured person and to the financial standing as well as the earning capacity of the deceased during the probable duration of the duty to support (so-called compulsory annuity). An annuity may also be claimed by other persons close to the deceased, to whom the deceased voluntarily and continuously supplied the means of subsistence, if it follows from the circumstances that the principles of community life so require (so-called non-compulsory annuity). According to art 447 KC, at the request of the injured party and when there are **3/162**

479 See *Kaliński,* Szkoda na mieniu 517. *Ludwichowska-Redo,* PiP no 11/2012, 108. For an opposing view see *E. Kowalewski/M. Nesterowicz,* Note on SN judgment of 12.10.2001 (III CZP 57/01, OSNC no 5/2002, item 57), Prawo Asekuracyjne (PA) no 3/2003, 73 f; *E. Kowalewski,* Odszkodowanie za ubytek wartości handlowej pojazdu po naprawie, Wiadomości Ubezpieczeniowe (WU) no 3/2011, 36 f; *Olejniczak* in: Kidyba, Kodeks cywilny, comment to art 363, no 3.

480 SN judgment of 12.10.2001, III CZP 57/01, OSNC no 5/2002, item 57.

weighty reasons for it, the court may award compensation to him/her in the form of a lump sum instead of an annuity or part of such; this pertains in particular to cases where the injured party has become disabled and granting him/her a lump sum will make it easier for him/her to exercise a new profession. It follows from the wording of art 447 KC that it is up to the injured party, and not at the court's discretion, to determine the form of compensation. The simple desire of the victim is, however, not enough reason to award a lump sum instead of an annuity: important reasons must be present which justify such a solution.

3/163 Similarly to the Germanic systems, the costs of future medical treatment may be requested in advance (art 444 § 1 sent 2 KC).

IV. Reduction of the duty to compensate

3/164 There is no general clause in the Civil Code allowing for a reduction of damages. Under the Code of Obligations, the role of such a clause was fulfilled by art 158 § 1, which stated that the amount of compensation must be determined having regard to all the circumstances of the case, and which grew to be very broadly interpreted by courts[481]. There is no equivalent of art 158 § 1 KZ in the Civil Code. Reduction of damages is possible only under art 440 KC[482], which allows for it solely under certain, clearly stipulated conditions, namely when both the victim and the liable party are natural persons and when a reduction is required by the principles of community life due to the financial status of the injured party or of the liable party (see no 3/137 above). It is emphasised that modifying the prerequisites for reduction by means of a reference to the concept of the *abuse of a right* (art 5 KC) and, for example, allowing such reduction in relationships between natural persons and legal entities, is not permitted[483]. *Szpunar* has pointed out that the wording of art 440 KC leaves no doubt as to the fact that the legislator wanted to tighten these prerequisites as well as that art 5 KC should not be understood as a norm overriding other provisions of private law and restricting a duty to compensate introduced by them[484]. It has also been pointed out that art 440 KC regulates the reduction of damages exhaustively and excludes the application of art 5 KC[485].

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481 See *Szpunar,* Ustalenie odszkodowania 172.

482 See also *Kaliński,* Szkoda na mieniu 618, who critically assesses art 440 KC and advocates its removal from the Civil Code *(Kaliński,* Szkoda na mieniu 621, 632).

483 Inter alia, *Safjan* in: Pietrzykowski, Kodeks cywilny 1697; see, however, SN judgment of 7.1.1972, I CR 12/71, OSNC no 7-8/1972, item 135, where the Supreme Court allowed for the assessment of a compensation claim on the basis of art 5 KC.

484 *Szpunar,* Ustalenie odszkodowania 182; see also *Kaliński,* Szkoda na mieniu 625.

485 *Szpunar,* Ustalenie odszkodowania 187.

Part 9 Prescription of compensation claims

The Polish legislator has opted for a rule combining a *short* and a *long* prescription period for delictual claims, each of which begins to run at a different point in time. The short period is three years and commences on the day on which the injured party *acquired knowledge of the damage and of the person obliged to redress it* (442[1] § 1 sent 1 KC). The long period is introduced by art 442[1] § 1 sent 2 KC, pursuant to which the prescription period cannot be longer than ten years from the date of the *occurrence of the damaging event.* If damage was caused by a crime, art 442[1] § 2 KC applies, according to which the claim becomes time-barred twenty years after the crime was committed, irrespective of when the injured party acquired knowledge of the damage and of the person liable. **3/165**

There is a special prescription regime for personal injury claims: such claims cannot become time-barred earlier than three years from the day on which the injured party acquired knowledge of the damage and of the person liable (art 442[1] § 3 KC). This means that neither the long-stop period of ten years, nor the period of twenty years concerning damage caused by a crime, applies to such claims, which are in effect only limited by the short prescription period counted a tempore scientiae[486]. However, one exception to this rule is acknowledged: if a personal injury was caused by a crime and the three-year period introduced by art 442[1] § 3 KC finishes earlier than the twenty-year period regulated by art 442[1] § 2 KC, the claim for compensation will become time-barred with the lapse of the latter rather than the former; this may be inferred from the wording of art 442[1] § 3 KC (»the claim cannot become time-barred earlier (...)«, which allows the conclusion that it *can* become time-barred later)[487]. **3/166**

The Civil Code also introduces a special rule protecting victims who are minors: according to art 442[1] § 4 KC, a personal injury claim of a minor cannot become time-barred earlier than two years from the day on which he/she reaches the age of majority. **3/167**

The rules on prescription in their present form are the result of an amendment of the Civil Code which came into force in August 2007[488], and which created a special prescription regime for personal injury claims, prolonged from ten to **3/168**

486 See, inter alia, *Radwański/Olejniczak,* Zobowiązania 275 f; *Safjan* in: Pietrzykowski, Kodeks cywilny 1705 f.

487 Thus, rightly *Safjan* in: Pietrzykowski, Kodeks cywilny 1711 f.

488 Dz U 2007, no 80 item 538; for more on the amendment, see *Bagińska* in: Koziol/Steininger, European Tort Law 2007, 451 f.

twenty years the long-stop period concerning claims for compensation of damage caused by a crime and introduced a special provision regarding personal injury claims of minors. The amendment followed the decision of the Constitutional Tribunal of 1 September 2006, which found the provision of the Civil Code introducing a ten-year long-stop period counted from the day the event causing damage took place (art 442 § 1 sent 2 KC) unconstitutional due to the fact that it deprived the injured party of the possibility to obtain compensation for personal injury that occurred after this time[489].

3/169 As follows from the above, the idea that a long prescription period should not commence prior to the occurrence of damage[490] is not reflected in Polish law; instead, the scope of application of the long-stop period counted a tempore facti has been restricted by excluding from it claims concerning interests most worthy of protection, ie personal injury claims.

489 SK 14/05; Dz U 2006, no 164, item 1166; OTK A 2006, no 8, item 97. Art 442 § 1 sent 2 KC, declared unconstitutional by the Tribunal, was subject to two diverging interpretations: a literal and a functional one. The latter, in accordance with which the ten-year long prescription period began to run on the day on which the damage occurred, was eventually rejected (see the resolution of the Full Civil Chamber of the Supreme Court of 17.2.2006, III CZP 84/05, OSNC no 7-8/2006, item 114, in which the SN opted for the literal interpretation); for more on this issue, see *Bagińska* in: Koziol/Steininger, European Tort Law 2006, 389 f; *Ludwichowska,* Odpowiedzialność cywilna 198 f.

490 Basic Questions I, no 9/29.

Hungary

Attila Menyhárd

Basic Questions of Tort Law from a Hungarian Perspective

Chapter 4

Basic Questions of Tort Law from a Hungarian Perspective

Attila Menyhárd

Part 1 Introduction

I. The victim's own risk

The overall tendency of looking at the world as if there should always be someone else responsible for losses suffered by members of society is also perceptible in Hungary. This general attitude of escaping self-reliance is present not only in reactions and expectations communicated in the mass media in connection with personal injury cases and high patrimonial losses suffered as a result of catastrophes or natural forces, but also in tendencies towards expanding liability in some specific fields of tort law, especially in some cases of professional negligence. **4/1**

Despite this tendency, the starting point of risk allocation in Hungarian private law is also the principle that the victim bears the loss if someone else does not have to do so. Thus, damage is to be borne by the person who suffered it, except when this is otherwise provided by the law. The basic principle of *casum sentit dominus* is provided as a property law rule[1] but is applied as the general rule of risk allocation in private law. It would also follow from the inner logic of law and the role of objective law in creating subjective rights and obligations: in the absence of objective law establishing such an obligation, there is no duty to pay compensation for losses suffered by other persons. Specific rules of risk allocation shifting the loss to persons other than the victim are provided in different parts of private **4/2**

1 Act no IV of 1959 on the Hungarian Civil Code § 99. Hereinafter referred to as the Civil Code 1959.

law. A statutory system of compensating lawfully caused losses such as those deriving from compulsory purchases or takings is provided for in specific legislation and is regarded as belonging to property law regulation. The question of whether it is allowed for the state to take over the property of persons, and if so, whether this can be done with or without an obligation to compensate the aggrieved owner as well as further problems of compensation, such as how compensation is to be provided, how it shall be measured and what types of losses may remain uncompensated are questions of the constitutional protection of property.

4/3 The allocation of risk of losses caused in the course of avoiding threatening danger (necessity) or self-defence is provided for in the property law regulation. There is a specific risk allocation rule covering the rights of the owner to receive compensation if goods were sacrificed in order to avoid the consequences of danger[2]. Liability in tort, as well as liability for breach of contract and restitution of unjust enrichment, is provided as part of the law of obligations.

4/4 There is a specific and unique risk allocation regime provided in a specific norm as a consequence of non-compliance with the principle of good faith and fair dealing. This rule creates a basis for compensation claims for losses suffered as a result of conduct induced by other persons and legitimate expectations created by them. According to this provision, if someone, with intentional conduct, induced another person in good faith and with good reason to act in a certain way, the former may be held fully or partly liable to compensate the latter for the damage he suffered through no fault of his own, because he relied on the inducement of the former. The conjunctive prerequisites for responsibility for such behaviour under § 6 Civil Code 1959 are[3]: intentional conduct (which does not necessarily aim at influencing the behaviour of the aggrieved person)[4]; the aggrieved person acted in good faith; the aggrieved person acting in good faith relied on the conduct in question and that conduct induced him – with reasonable ground – to act[5]; the aggrieved person suffered harm as a result of his own conduct induced by the other; and the aggrieved person suffered harm through no fault of his own.

4/5 This provision of the Civil Code 1959 established an obligation which is not based on tort liability: neither fault nor unlawfulness of the defendant's conduct is a precondition of the obligation to compensate the victim. A contractual relationship between the parties precludes the application of this rule[6]. The rule

2 Hungarian Civil Code 1959, § 107 (3).

3 The same rule is provided in Act no V of 2013 on the new Hungarian Civil Code (in particular, § 6:587) which came into force on 15 March 2014. Hereinafter referred to as the Civil Code 2013.

4 It is not clear what the scope of the intent of the person should be in order to establish the application of the Civil Code 1959, § 6.

5 There must be a causal link between the conduct and the actions of the aggrieved party. Supreme Court, Legf. Bír. Pfv. V. 22.772/1995 sz. BH 1997 no 275.

6 Supreme Court, P. törv. I. 20.501/1983 sz. (PJD X. 5.) BH 1984 no 144.

aims at protecting reliance interests – just like *estoppel* in common law jurisdictions – and allocating the risks involved in the plaintiff's own conduct[7]. It is a general remedy for suffering harm as a consequence of reliance on another's conduct. Fault, duty of care or compliance with required standards of conduct are not to be considered in the course of establishing such obligation to award partial or total compensation to the aggrieved person. This rule gives the opportunity for an ex post direct risk allocation in the hands of the judge, independently of the legal evaluation of the behaviour of the defendant.

4/6 The provision is very specific from a theoretical as well as from a practical point of view. It puts behaviour, namely the conduct inducing the aggrieved person to do something, into a grey area, somewhere between conduct that is legally prohibited and conduct that is legally allowed from the point of view of legal evaluation. The theoretical starting point of the legislator was to provide a remedy for the consequences of behaviour which is neither unlawful (unlawfulness would establish liability in tort) nor lawful (lawful behaviour shall not be sanctioned) and does not consist of a breach of a contractual promise either[8]. From this it follows that this provision cannot be applied if the conduct triggers liability in tort or establishes liability for breach of contract. In such cases, the victim would be entitled to claim a remedy for tort or for breach of contract. The conduct which the aggrieved person relied upon can neither be prohibited nor amount to an offer or acceptance resulting in the conclusion of a contract[9]. According to this specific rule of risk allocation, the court *may* impose an obligation on the person inducing the other to act, to compensate fully or in part the aggrieved person who suffered harm. The court has a wide discretionary power in deciding whether or not to order compensation at all, and if it does so, to what extent the aggrieved party's loss is to be compensated[10]. Courts in the past two decades seem to have been reluctant to award damages on the basis of this rule. The general principle is that the application of this rule should not result in shifting normal business risks to other market players. The main rule the courts follow is that an enterprise has to bear the risk of its activities, even if it incurs expenses as a result of behaviour it was inclined towards by another party's statement. The frustrated party shall be entitled to compensation only if the statement of the other was so concrete and definite that the former could rely on contracting with reasonable certainty, especially if this reliance led the frustrated party to give up another alternative obligation or if it incurred reasonable extra expenditure[11]. Court practice is systematic in that the

7 Hungarian Civil Code 1959, § 6. The rule is mostly called for in cases of culpa in contrahendo.
8 Official Explanatory Notes for the Civil Code 1959, 38.
9 Official Explanatory Notes for the Civil Code 1959, 39. *T. Lábady,* A magyar magánjog (polgári jog) általános része (2002) 304.
10 *K. Benedek/M. Világhy,* A Polgári Törvénykönyv a gyakorlatban (1965) 38 f.
11 Supreme Court, Guideline GK no 14.

costs and expenses which were necessary to make business decisions, to decide whether to make or accept an offer and, if so, according to what terms (including the price the party would expect to get or to pay), or which party to choose if there are more different alternatives, shall be borne by the party itself and these costs and expenses cannot be shifted to the other even if the basis of this expenditure was an expectation that has been frustrated[12].

4/7 Insurance plays an increasingly important role in risk allocation. It does not, however, allocate or shift the risks covered in a final manner. Insurance law regulation, with a statutory assignment (cessio legis), explicitly provides for the recourse rights of the insurance company against the tortfeasor. The insurance company, upon payment of compensation, shall become entitled to the rights of the insured with regard to the person liable for damages[13]. In the case of third-party (liability) insurance, this assignment by law was provided for cases of deliberate or grossly negligent wrongdoing specified in the insurance contract under the Civil Code 1959[14] but is not covered by specific rules under the Civil Code 2013. This means that under the Civil Code 2013 it is up to the parties or to specific regulations to limit such claims by the insurer.

4/8 There are also statutory compensation schemes in Hungary in order to provide compensation to victims of crimes[15] and also to victims of catastrophes (on an ad hoc basis).

4/9 Liability creating an obligation to compensate a victim for losses that are attributable to the tortfeasor is a part of the risk allocation system, shifting the risk of losses that were caused unlawfully by other persons to such persons. Whether it is the actual wrongdoer or other persons (operator of an extra-hazardous activity, an owner of a building, an employer, a principal, etc) who shall be liable for providing the compensation depends on tort rules. As far as tort law in Hungary is concerned, there is no clear consensus on whether compensation or prevention is the primary aim of liability. Normally both of them are emphasised in theories of tort law and also in law-making.

4/10 It seems that the structure, the basic principles and means of risk allocation in Hungarian law are in line with the main structures and principles of other jurisdictions. The specific features of Hungarian legislation do not lead to a system of risk allocation that would considerably differ from the risk allocation methods of other jurisdictions in Europe.

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12 Supreme Court, Legf. Bír. Pfv. IV. 21.606/1993 sz. BH 1994 no 308; Supreme Court, Legf. Bír. Pfv. III. 22.883/2001 sz. BH 2005 no 12.

13 Unless this person is a relative living in the household of the insured. Civil Code 1959, § 558 (1); Civil Code 2013, § 6:468 (1).

14 Civil Code 1959, § 559 (3).

15 Act no CXXXV of 2005 on providing help to the victims of crimes and mitigating the loss suffered by them.

II. An insurance-based solution instead of liability law?

The idea that a comprehensive system of insurance could provide a general risk allocation regime in society, replacing tort liability, has also been presented in Hungarian legal literature. *Sólyom* pointed out that the traditional structure of tort liability had been disappearing and growing into a new, insurance-based risk allocation system[16]. The tendency toward expanding insurance certainly holds true for some specific areas, like the compulsory third-party liability insurance regime for motor vehicles. Such regimes may change the allocation of risk as far as the losses covered by them are concerned but they do not necessarily change the structure of liability. It is still the liability of the insured tortfeasor that remains the basis of the obligation of the insurance company to pay compensation to the victim. This always creates a strong link between insurance and tort liability. Moreover, as a result of the statutory assignment provided by the regulation, the insurance company, as the assignee of the victim, has the right to enforce the claim against the person liable for damages. In such cases the basis of the claim of the insurance company is again the liability of the defendant. Thus, it seems that, if the risk allocation system in society intends to keep the preventive effect which is, according to the policy underlying liability, the indirect function of tort law[17], insurance cannot provide a solution instead of liability law but can only be a kind of intermediary tool for risk spreading. Insurance can provide coverage for victims in order to make it certain that their loss will be compensated but this does not mean that it could replace the system of liability. **4/11**

In the socialist era, the wide-ranging national health insurance system provided an alternative risk allocation to tort law for cases of personal injury and that is still the case today. In cases of personal injury or impairment of health, only damages that are not covered by the national health insurance can be awarded to the victim on the basis of tort law. This means that for such cases national health insurance is also part of the risk allocation system. **4/12**

III. Strict limits and rigid norms or fluid transitions and elastic rules?

From the point of view of structure, policy and regulation, there are clear distinctions to be drawn between tort, contract and restitution, and, under tort law, be- **4/13**

16 *L. Sólyom,* A polgári jogi felelősség hanyatlása (1977) 29.
17 Official Explanatory Notes for the Civil Code 1959, 363.

tween the different prerequisites for liability. There are, however, no clear boundaries delimiting these sources of obligations, neither can the lines between the prerequisites for liability be consequently drawn. The basic common features of liability in tort and liability for breach of contract are that both are the consequences (sanctions) of non-compliance with a duty and both concern an obligation to pay damages. The main differences are in the basic policy and in the assessment of damages. The basic policy underlying tort law is compensation and prevention of wrongdoing, while in contract law it is the protection of the reliance on the promises of others. This approach is in line with the fact that, in the case of contracts, this duty was voluntarily undertaken by the party, while in tort the duty was imposed by law. As far as the assessment of damages is concerned, in tort law the victim should be restored to a position as if the damage had never occurred; on the other hand, in contract law the aggrieved party ought to be brought into a position as if the contractual promise had been kept. Although these differences may be seen as fundamental ones, that is not necessarily the case. While one objective is negative, ie »as if the loss had not been suffered«, and the other positive, ie »as if the contract had been performed«, the consequences in most cases can be interchangeable, ie performing the contract can equally be described as not breaching it. Rights and obligations can also be derived from law in the case of contracts, eg terms implied by interpretation of general clauses like good faith and fair dealing and contractual duties may be assumed by law even in the absence of contracts. Cases of compulsory contracting, either directly or indirectly, such as anti-discrimination law, or the modern remnants of the medieval common callings, make it impossible to draw a clear line between duties undertaken voluntarily and those imposed by law. Culpa in contrahendo as the basis for liability for non-compliance with the implied obligations of the parties (especially the duty of disclosure) in the pre-contracting stage was a case for liability in tort according to court practice, while in the Civil Code 2013 it either involves liability in tort or liability for breach of contract depending on whether the contract had been concluded is discussed in more detail below.

4/14 Thus, although on the level of basic theory and doctrine there is a sharp distinction to be made between liability for torts and liability for breach of contract, this may not result in clear delimitations in practice or on the level of deeper analyses.

4/15 Damages and unjust enrichment seem to be two completely different legal institutions with only one common feature, namely, that the consequence is an obligation to pay a certain sum to the aggrieved person. With liability, there is the loss suffered by the victim and damages are to be calculated on the basis of that loss; the main policy behind liability is compensation of losses and prevention of wrongdoing; as a main rule, it is fault-based and also covers lost profit. At the focus of unjust enrichment is the benefit gained by the defendant to the detriment

of the plaintiff; the main policy underlying the law of restitution is restoring the original state and avoiding illegal benefit; in the context of restitution no fault is to be considered and no lost profit is to be considered. This, however, does not mean that damages and unjust enrichment could not be overlapping categories. If, for example, a truck owned by a company is used for business purposes by another without any legal title to do so, this situation can be described either as a tort case where the owner can claim damages on the ground that he suffered losses (costs of hiring another truck or lost profit) due to wrongful interference with his property or, as a case of unjust enrichment and restitution, where the owner can claim the profit the other party earned by using property which should have brought a profit to him. In such cases there cannot be a clear delimitation made between damages and unjust enrichment, although the position of the plaintiff is different in the two claims. On the one hand, the sums to be claimed are presumably not the same; the question of which is higher depends on the circumstances of the case. On the other hand, by claiming damages the plaintiff runs the risk that if the defendant can exonerate himself, he may be relieved of liability.

4/16 Neither regulation nor prevailing doctrines refer to absolutely protected rights and unprotected interests in Hungarian tort law. Establishing priorities, however, has always been inherent in Hungarian tort law. The utmost protection of inherent rights of persons, especially human dignity, health, and bodily integrity was already expressed in the landmark decisions of the Hungarian Constitutional Court on the incompatibility of the death penalty with the Constitution, declaring human life as an absolutely protected value, establishing the doctrine of »invisible constitution«[18] and on non-pecuniary damages as well[19]. This ranking of protected interests may be realised in very recent tendencies towards accepting and applying doctrines such as the acceptance of reducing the probability of recovery or loss of a chance as a causal link[20] in medical malpractice cases[21] and referring to strict forms of liability and expanding their scope in order to establish liability in other cases of personal injury[22].

4/17 It is often said that, although the main policy of preventing wrongdoing is common to tort and criminal law, the great difference between them is that criminal law is more flexible in the determination of applicable sanctions by taking into account and weighing the specific circumstances of the case as well as those of the tortfeasor. In contrast to this, private law, especially tort law, follows a »black or white« approach which is supported by the principle of full compensation. It may

18 Constitutional Court of the Hungarian Republic 23/1990 (X.31.) AB. hat.
19 Constitutional Court of the Hungarian Republic 34/1992 (VI.1.) AB. hat.
20 *E. Jójárt,* Az esély elvesztése, mint kár? Jogtudományi Közlöny [Hungarian Law Journal] 64 (2009) no 12, 518.
21 Supreme Court, Legf. Bír. Pf. III. 25.423/2002 sz. BH 2005 no 251.
22 Supreme Court, Legf. Bír. Pf. III. 21.046/1992 sz. BH 1993 no 678.

seem that if someone is held liable for damage, he could neither be partially liable nor be obliged to provide only partial compensation for the losses he caused. Such an »all-or-nothing approach« may be true from a purely theoretical perspective but has never been an attribute of tort law. Not only the victim's contributory negligence can lead to a reduction of damages but also court practice elaborates upon other doctrines as well, such as partial causation which leads to the tortfeasor being liable only for the part of damage that is proportionate to the degree of causation attributed to him. According to this approach, if the defendant's conduct as a conditio sine qua non contributed with a certain percentage to the loss of the victim while other circumstances also contributed (natural facts, unidentified circumstances etc), the liability of the tortfeasor shall be established only for the part of the loss caused by him[23]. Even if the liability of the tortfeasor is established for the whole damage, this does not necessarily mean that he shall be obliged to pay compensation for the entire loss he caused, because for special reasons of equity the court may grant partial exemption from liability to the person who is liable for the damage[24].

4/18 Hungarian tort law, as is true of other jurisdictions as well, is a system of open rules allowing great power to the courts and letting them establish and apply the proper guidelines to assess tort law cases. As a result of this system, a great part of Hungarian tort law is judge-made law, which applies a complex system of criteria to assess and decide tort law cases and to draw the boundaries of liability. Tort law as a law in action is a flexible system in the sense that has been established by *Wilburg*[25], where the decision of the court results from weighing up different elements in each of the tort cases. This system, through the open rules of the tort law regulation, provides the measures to perform proper risk allocation. *Grosschmid* pointed out already at the beginning of the last century that the scales of tort law are influenced by many factors, such that the balance in any given case is heavily influenced by the specific situation. Rather than reflecting upon one sole feature, the courts' decisions depend on the complex interplay of many features of the case[26].

4/19 The structure of regulation does not necessarily suggest this system; written law can be misleading and disguise the real mechanisms and model of private law. The importance of written law is often overestimated and this is particularly true

23 Supreme Court, Legf. Bír. Mfv. I. 10.710/2007 sz. EBH 2008 no 1803.

24 Civil Code 1959, § 339 (2); Civil Code 2013, § 6:522 (4). Such equitable circumstances can be established by the financial position of the plaintiff (is the loss big or small considering the patrimony of the plaintiff) and the defendant (poor patrimonial conditions). Official Explanatory Notes for the Civil Code 1959, 370.

25 *W. Wilburg,* Entwicklung eines beweglichen Systems im Bürgerlichen Recht (1950). Also *W. Wilburg,* Zusammenspiel der Kräfte im Aufbau des Schuldrechts 163, Archiv für die civilistische Praxis (AcP) 163 (1964) 364 ff.

26 *B. Grosschmid,* Fejezetek kötelmi jogunk köréből (1932) 679.

for tort law. Prior to codification of private law in 1959, there were two competing concepts developed on how tort law is to be described properly, how it works and what the correct model of it is. *Marton* proposed that fault as a subjective element is not an inherent part of the system of civil law liability. He went back to the roots of Roman law and held that fault as a prerequisite for liability comes from the misunderstanding of the lex Aquilia. He built up a coherent system, where the underlying policy is that the primary function of tort law is the prevention of wrongdoing. In line with this, the basic evaluation shall be that unlawfully caused losses are to be compensated. Certain circumstances of the case may, however, overwrite this basic evaluation and result in a reduction or elimination of liability. The elements which shall be assessed and taken into account in the course of establishing liability and which may overwrite the basic evaluation are the weight of the violated interests and the interests of the wrongdoer linked with the damaging conduct, the capability of the defendant enterprise to spread damages among its customers by incorporating them in the price of its products as part of the production costs, the degree of fault and equity[27].

4/20 *Eörsi,* whose works decisively influenced not only the theory of civil liability in the socialist era but also the designing of the rules covering liability in the Civil Code 1959, accepted that prevention should be the leading policy underlying tort law. *Eörsi,* however, in contrast to *Marton,* rejected the idea that the starting point should be that unlawfully caused losses are to be compensated. He considered fault as the central element of liability and built up his theory of civil liability on the idea that if prevention of wrongdoing is the main aim of civil law liability, then it is primarily the wrongful behaviour that should be addressed by law. Instead of *Marton's* system, defining the elements that are to be considered, weighed and evaluated, *Eörsi's* theory prevailed in the course of the preparation of the Civil Code 1959. The result of this was a concept of liability describing the main elements of liability (damage, unlawfulness, causal link and fault) without determining the limiting factors or elements of evaluation, except the one referring to equitable grounds. Later *Eörsi,* revisiting and reconsidering this system, also described and summarised the limitation doctrines that may result in dismissing a claim for damages[28].

27 *G. Marton,* A polgári jogi felelősség (1993) 100 ff.

28 *Gy. Eörsi,* A közvetett károk határai in Emlékkönyv Beck Salamon születésének 100. évfordulójára (1985) 62. Below no 4/158 ff under »Limitations of liability«.

Part 2 The law of damages within the system for the protection of rights and legal interests

I. In general

4/21 The system for protecting rights and legal interests rests on pillars provided by different parts of law. There are basically two levels of division. The first division is the public-private divide. According to the prevailing view, public law is the law governing the structure and activity of the state and state organisations[29], while private law covers legal relationships of persons acting autonomously. These parts of law, according to the prevailing view, have nothing to do with each other. In theory, practice and tort law regulation there seems to be a Chinese wall between public law and private law. This wall is strengthened by the concept of unlawfulness and fault in tort law which are independent of public law regulation. Tort law is built upon an autonomous concept of unlawfulness where damaging acts are unlawful *per se* and can only be regarded as lawful if such is explicitly provided by the law[30]. Thus, measures provided by public law, in order to protect the rights and legal interests of persons, are independent of and do not influence the measures provided by private law. Now, in regulation and legal theory, there is no direct link assumed between private law on the one hand and the Constitution[31], criminal law or other specific legislation providing protection of rights and legal interests on the other hand. As far as criminal law is concerned, the procedural context would make such an interaction possible as victims of crime have the right to enforce their claims in criminal procedures. Courts, however, normally, and especially if the claim is difficult to decide, separate such claims and relegate them to normal civil procedure.

4/22 The other level of division is within private law. Each field of private law provides different tools for protecting the rights and legally protected interests of persons. Inherent rights of persons are protected by a complex system of claims available to the victim on the basis of unlawful interference with these rights. On the basis of factual elements of the offence, the aggrieved person has the right to

29 *Lábady,* A Magyar magánjog (polgári jog) általános része 22.

30 *T. Lábady* in: L. Vékás (ed), A Polgári Törvénykönyv magyarázatokkal (2013) 944.

31 According to the prevailing view, the Constitution (Basic Law) creates rights and obligations between the state and members of society but shall not be directly applicable in private law relationships. *L. Vékás,* A szerződési szabadság alkotmányos korlátai, Jogtudományi Közlöny 1999, no 2, 59. *A. Vincze,* Az Alkotmány rendelkezéseinek érvényre juttatása a polgári jogviszonyokban, Polgári Jogi Kodifikáció 2004, no 3, 3 ff.

claim from the court a declaration of the occurrence of the offence, to demand prohibition of the infringement, to demand that the perpetrator give satisfaction in a declaration or by some other suitable means and, if necessary, that the perpetrator, at his own expense, make an appropriate public disclosure of this, to demand the termination of the unlawful situation and the restoration of his previous state at the expense of the perpetrator and, furthermore, to have the thing violating the inherent rights of the plaintiff destroyed or deprived of its unlawful nature. The Civil Code 2013 also provides for the right to claim restitution of benefits gained at the price of unlawful interference according to the rules covering unjust enrichment[32]. If property rights are interfered with unlawfully, the owner has the right to claim the thing back with a rei vindicatio or equivalent claim in land law. These consequences (claims) do not require fault or other form of wrongfulness but are applicable merely on the ground of the facts of the case. Liability (for damages) is seen as a general sanction of interference with rights or legally protected interests, either patrimonial or personal, if the unlawful interference with protected rights was the result of conduct which did not comply with the duty of care required by the law.

II. Claims for recovery

The system of Hungarian private law is structured according to the principle that the main goal of the law is to promote the status required by the law. Thus, obligations are to be performed and prohibitions are to be enforced in kind, as they are. The law is not to provide choices to persons as to whether they fulfil their duties or »buy« themselves out by paying damages, but to enforce the rights and obligations imposed upon them. This approach is followed in contract law as well as in tort law and is also suggested in the system of protecting inherent rights of persons. **4/23**

In the structure of protection of inherent rights of persons, awarding non-pecuniary damages is only one of the applicable sanctions and is not mentioned as a primary one either in the Civil Code 1959 or in the Civil Code 2013. In contract law, the general rule is specific performance[33] and monetary compensation **4/24**

32 Civil Code 1959, § 84 (1) and Civil Code 2013, § 2:51.

33 Civil Code 1959, § 277 (1) provided that contracts shall be performed as stipulated, at the place and at the time set forth and in accordance with the quantity, quality, and range specified therein. This provision of the Code underlies one of the basic principles of the rules of performance in the Code, performance in kind. The same approach was upheld in the Civil Code 2013 which provides that obligations are to be performed according to their content (§ 6:34). Claims for performance in kind are also explicitly provided for in the Civil Code 1959, § 300 (1) and the Civil Code 2013, § 6:154 (1).

replaces enforcement of performance only if performance in kind is impossible or if it would not meet the interests of the creditor[34]. In the context of tort law, under the Civil Code 1959 the person responsible for the damage was liable for restoring the original state, or, if this was not possible or if the aggrieved party refused restoration on a reasonable ground, he had to pay damages to the victim to compensate his pecuniary and non-pecuniary losses[35]. Thus, in tort law, recovery was the primary obligation of the liable person. In practice, however, plaintiffs normally claimed damages. There were actually no claims presented at courts for restoration of the original state. This also holds true for contract law, where normally the claims are for damages and for the protection of persons, where the general remedy is awarding non-pecuniary damages. The Civil Code 2013 does not maintain this system. It does not provide for restoration in kind as a primary duty of the liable person but rather the payment of damages[36]. The main reason for this change was that, in most cases, it was impossible to have restoration in kind executed. If this is not the case, and it is under the given circumstances reasonable to do so, providing redress in kind is an appropriate solution[37].

III. Preventive injunctions

4/25 The Civil Code 1959, as well as the Civil Code 2013, provide clear rules for ordering preventive injunctions. If someone creates a risk of imminent damage, the endangered person is entitled to request the court to prohibit the person imposing the danger from continuing such conduct and/or to order such person to take sufficient preventive measures and, if necessary, to provide a guarantee[38]. Although the threatening damage has to be unlawful in order for such a judgment to be passed, wrongfulness is not a precondition for exercising this right of the endangered per-

34 It is also expressly stated in the Official Explanatory Notes for the Civil Code 1959, at 295. *A. Harmathy,* The Binding Force of Contract in Hungarian Law, in: A. Harmathy (ed), Binding Force of Contract, Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences (1991) 29. The general principle of enforced performance is supported by other provisions of the Civil Code too.

35 Civil Code 1959, § 355 (1).

36 Civil Code 2013, § 6:527.

37 *Lábady* in: Vékás (ed), A Polgári Törvénykönyv magyarázatokkal 947. Providing damages in kind is also possible under the Civil Code 1959 as well as under the Civil Code 2013: Civil Code 1959, § 355 (2); Civil Code 2013, § 6:527 (1).

38 Civil Code 1959, § 341 (1). According to § 6:523 of the Civil Code 2013, in the case of danger of suffering loss, the person in danger may ask the court, according to the circumstances of the case, to prohibit the person who threatens to cause damage from proceeding with dangerous conduct; to oblige him to implement measures to prevent the damage; or to oblige him to give security.

son as the primary aim of this rule is preventing the occurrence of loss and not imposing sanctions on a wrongdoer[39]. Capacity of being responsible is also not a precondition of such a prohibitive judgment. Thus, even in the absence of relevant reported court practice on this issue, one has to come to the conclusion that incapacity to commit torts on the part of the party endangering the other's person or patrimony is irrelevant from the point of view of passing such a judgment. Prohibitive judgments can be issued against such persons as well. Claims for such prohibitive injunctions are also provided in specific legislation covering protection of intellectual property, competition law or consumer protection.

IV. Rights to self-defence

4/26 Self-defence is qualified as a lawful act and as such, not as a basis for awarding damages. Any damage caused to an aggressor in order to prevent an unlawful assault or a threat suggesting an unlawful direct assault will be compensated if the defender did not use excessive measures to avert the assault[40]. Compared to preventive injunctions, the rule concerning self-defence presupposes that the party defending his person or property causes loss to the other attacking him, while the claim for a preventive prohibitive judgment does not involve such facts. This is why there is a necessity for weighing up the position of the attacker and the party defending himself. The measure for this, however, is not entirely clear. The relevant provision of the Civil Code requires the court to assess whether or not the defensive measure exceeded the degree that was necessary in order to protect the endangered value. This does not necessarily imply a weighing up of the protected interests. Weighing up the protected interests, however, seems to be unavoidable, because determining the necessary degree of defence requires or implies a moral evaluation which cannot be done without establishing such priorities. The problem of moral evaluation and ranking of interests may be presented in cases and in discussions of the problem of whether an owner may protect his property against theft by creating lethal traps for potential thieves. This highly controversial issue involves the problem of how the interest in protecting property and in protecting life, health and bodily integrity can be weighed against each other. Court practice did not accept that killing the thief with such traps, eg by leading electricity

39 Official Explanatory Notes for the Civil Code 1959, 371.

40 Civil Code 1959, § 343. In line with the Civil Code 1959, the Civil Code 2013 provides, in the context of describing unlawfulness, that all of the wrongdoings causing damage shall be deemed unlawful, except if caused to an aggressor in the course of warding off an unlawful attack or the threat of an imminent unlawful attack insofar as such conduct did not exceed what was necessary to ward off the attack; Civil Code 2013, § 6:520.

to the fence, could be a lawful act[41]. It was certainly an important factor for the courts that life is a higher ranked, thus more protected, interest than property. The problem of self-defence, however, implies the question of a state monopoly on law enforcement as well. If the state wants to keep the monopoly of administration of justice, the courts have to be reluctant to accept self-defence except where it was clearly necessary. For this reason it is difficult to assess whether the policy underlying the restrictive approach of courts is the ranking of protected interests, guarding the state's monopoly of administration of justice or both.

V. Reparative injunctions

4/27 Due to the approach underlying the Civil Code that the status required by the law shall be enforced, reparative injunctions play an important role not only in the system of sanctions of the Civil Code but also as part of other statutory regulation belonging to private law. Reparative injunctions are to be defined as obligations imposed on the interferer to actively do something, ie remove the source of interference. Such sanctions are an important part of the system of protection of persons and intellectual property. Their basic feature is that – in contrast to damages – they have an objective nature, thus, they are to be imposed on the interferer in the absence of fault as well[42]. The only prerequisite for such an injunction is the unlawfulness of the interference with the plaintiff's protected rights.

VI. Unjust enrichment by interference

4/28 The relationship between liability and unjust enrichment[43] is a very difficult issue in the context of the law of obligations. At first sight, there may not be too many common features that damages and restitution share. It does, however, happen quite often that the profit lost by the victim of a wrongdoing can equally be described as a gain earned by the wrongdoer to the detriment of the victim. Thus, the same facts can provide the basis either for a claim for damages or a claim for restitution. Due to this strong interrelation, before World War II, in former Hungarian court practice, a very close connection was postulated between tort liability and restitution. It was held that restitution is a kind of minimum damages which

41 Supreme Court, Legf. Bír. Bf. I. 1539/1998 sz. BH 2000 no 97.
42 Civil Code 1959, § 84 (1).
43 Civil Code 1959, § 361 ff; Civil Code 2013, § 6:579 ff.

can be awarded automatically even in the absence of a direct claim if the defendant earned a profit to the detriment of the plaintiff and the plaintiff claimed damages but the liability of the defendant could not be established due to absence of fault but the preconditions for an obligation of restitution could be met[44]. Today, in Hungarian court practice the prevailing view is that restitution can only be a subsidiary sanction, but it remains unclear what the meaning of this principle is. Courts often simply refer to this principle as a ground for rejecting the claim and they do it mostly if there was a contractual relationship between the parties[45]. The subsidiary nature of unjust enrichment, according to the courts, should be understood as excluding restitution if there is a legal ground for claiming damages[46]. This seems to be a misunderstanding of the legal nature and role of restitution and an oversimplification of the subsidiary nature of unjust enrichment. In cases where the claim for unjust enrichment could be formulated as a claim for damages as well, rejecting the claim for restitution on the ground that the plaintiff should have filed a claim for damages instead is a clearly unjust, unfounded and unsustainable practice.

4/29 The rules of the Civil Code 1959 covering unjust enrichment allowed only a very narrow path for the interferer to be relieved of the obligation to restore the enrichment: if the interferer was deprived of the gains before they were reclaimed, he was not obliged to return them unless the obligation to return the gains was an imminent possibility and he could be held accountable for the loss of the gains, or the gains had been acquired in bad faith. If a person to whom any gains are due to be returned had created such gains through unlawful or immoral conduct, the court was entitled to transfer the material gains to the state at the motion of the public prosecutor. The Civil Code 2013 also maintains the exemption on the basis of change of position[47] but not the possibility of awarding restitution to the state. Under the Civil Code 2013 such sanction can no longer be applied.

4/30 There are cases, and it is in certain situations also typical, that the gain the tortfeasor earned as the result of wrongdoing exceeds the loss suffered by the victim. In such cases liability to compensate (awarding damages) does not have a preventive effect because it is feasible for the tortfeasor to »buy« the benefit at the cost of damages. If punitive damages cannot be awarded in a legal system, it might be a good solution in these cases to shift the benefit to the victim on the basis of unjust enrichment. That was the idea behind introducing such a solution in the Civil Code 2013 as a specific consequence of unlawful interference with inherent rights of persons. According to this rule, if someone interferes unlawfully with

44 *Személyi* in: K. Szladits, A Magyar Magánjog. Kötelmi jog különös rész (1942) 747 ff.
45 Supreme Court, Legf. Bír. Pfv. VI. 22.261/1993 sz. BH 1996 no 93.
46 Supreme Court, Legf. Bír. Pfv. VIII. 20.051/2009 sz. BH 2009 no 296.
47 Civil Code 1959, § 361 (2); Civil Code 2013, § 6:579 (2).

the inherent rights of another, the victim shall have the right to claim the benefit the wrongdoer earned as the result of wrongdoing according to the rules covering restitution of unjust enrichment. Fault is not a prerequisite for such a claim[48]. The provision explicitly refers to the application of rules covering restitution of unjust enrichment. The main consideration was to provide a remedy against the press in cases of wrongful interference with privacy or good reputation and to prevent publishers from »buying« their profit at the price of interference with the personality rights of members of society. This restitutionary sanction, modelled upon similar solutions for sanctioning unlawful interference with intellectual property rights, is to be applied as an objective (or strict) one, ie the plaintiff shall have a claim for restitution even if the defendant was not at fault in unlawfully interfering. In the Hungarian legal system a similar solution is applied in the regulation covering intellectual property law as well as in competition law regulations[49]. Damages (liability) neither seem to provide a proper remedy in cases where directors breached their duty of loyalty by exploiting a profit making opportunity (eg making a transaction in their own name for their own profit) owed to the company for themselves. It is hardly acceptable that directors could violate their duty of loyalty without consequences if the company were not in a position (eg due to shortage of funds) to exploit the profit making opportunity. In such cases the proper remedy would be to allow the company to request that the gain the director earned on the basis of unjust enrichment be transferred.

4/31 The rule covering unjust enrichment requires that the party obliged to restore the gain has acquired the gain to the detriment of the plaintiff (owner or otherwise entitled person). This, however, does not necessarily mean that the same profit could have been earned by the entitled person. It is enough that the enriched party did not »buy« the position of utilising the asset by acquiring the title from the party to whom the asset was allocated by law. This also holds true if unjust enrichment was not established by utilising goods or other positions without entitlement but in the context of interference with inherent rights of persons as well.

4/32 The approach, looking at restitution of unjust enrichment and liability for damages as complementary claims constituting one coherent system for providing remedies of corrective justice, can establish a regime which may supply a proper tool for private law enforcement as well.

48 Civil Code 2013, § 2:51 (1) (e).

49 Act no LVII of 1996 on the Prohibition of Unfair Competition and Anti-Trust Law § 86 (3). Act no LXXVI of 1999 on Copyright Law § 94 (1) (e).

VII. Creditors' avoidance

Actio Pauliana is provided in Hungarian private law to deprive the contract, or, more precisely, the transfer of assets of its effect vis-à-vis the creditor if the party acquiring the property or other rights acted in bad faith or had a gratuitous advantage originating from the contract. The consequence of such a transaction is that the party acquiring the property or other transferable rights has to tolerate the fact that the creditor of the transferor seizes the transferred asset in order to satisfy his claim. The interrelation between this rule and the law of damages has not been addressed so far. The liability or fault of the transferor is irrelevant as the qualification of bad faith is independent of fault. Establishing bad faith, however, implies non-compliance with the required standard of conduct, which necessarily establishes fault in the context of liability. The acquirer was in bad faith if he knew or ought to have known that the transaction would deprive the transferor's creditor of the coverage of his claim. Whether the acquirer ought to have known that the transaction would deprive the transferor's creditor of coverage will be assessed according to the required standard of conduct. The interaction with bankruptcy law was solved by court practice by giving priority to liquidation as a specific regulation (lex specialis); the creditor successfully enforcing his claim against the transferee on the basis of »actio Pauliana« shall be obliged to give this money back to the bankrupt's estate in order to channel it to satisfy claims of creditors according to bankruptcy law[50]. There is, however, no doctrine for the case if the creditor successfully enforces his claim vis-à-vis the transferee prior to launching the liquidation procedure. **4/33**

The liability of the transferee may come into the picture if he passes the thing (or transferable right) to a person who did not act in bad faith and acquired the title for counter-value[51]. **4/34**

VIII. Claims for damages

Hungarian tort law rests on the view that damages are of a compensatory nature. This means that, as a principle, the victim shall be brought into a position as if the loss had never occurred. The victim shall not be in a position which is worse than before suffering the loss. This is the purpose of damages. On the other hand, he **4/35**

50 Supreme Court, Legf. Bír. Pfv. VII. 21.659/2008 sz. BH 2009 no 178.

51 Further transferees acquiring the asset in bad faith or without counter-value come under the application of »actio Pauliana«. This tracing is explicitly established in court practice in the Supreme Court Opinion no 1/2011 (VI.15.). Supreme Court, Guideline PK no 9.

shall not be in a better position either, because this would mean that he was paid without entitlement and he was enriched to the detriment of the tortfeasor. It is a generally accepted principle that the victim should be prevented from making a profit on his own loss. This, however, is not expressly declared in the Civil Code, although it clearly follows from the concept of damage, ie that damage includes the actual loss, lost profits and the costs of prevention and avoidance of the loss and the rules covering restitution of unjust enrichment. According to this principle, in the course of calculating the sum of damages to be awarded, the amount of damages shall be reduced by the sum the victim earned or saved as a result of the damage, such as payments under the national health care system[52] or an increase of value in the victim's property as a result of the damaging event. In line with the principle of full compensation, the plaintiff shall be compensated for all the losses he suffered but cannot be paid more[53].

4/36 This principle is in compliance with the structure and underlying policies of private law but in certain cases it is impossible to assess the exact sum that the proper compensation of the loss suffered could be. This is the case for losses in the future, non-pecuniary damage or cases where it is impossible to establish the value of the loss on any other grounds. However, the principle of full compensation and the prohibition on gaining profit from the loss should be maintained in such cases as well. If the problem is that the loss cannot be assessed because it is impossible to establish its amount, eg because it will emerge in the future, or it is impossible to prove it exactly on other grounds, a general assessment of damages may be an appropriate solution; the court will award damages that are, according to the conviction of the court, capable of giving compensation. Such general damages are to be awarded if the extent of damage cannot be precisely calculated. In such cases the person responsible for causing the damage can be ordered by the court to pay a general indemnification that would be sufficient to provide the victim with full monetary compensation[54].

4/37 If the loss cannot be assessed due its non-pecuniary character, an assessment of damage is not possible: expressing in money what cannot be sold on the market due to the moral value attached to it is a contradiction. In the context of non-pecuniary damage there are strong arguments for the position that one cannot speak of damage and what is to be paid as compensation cannot be damages in the traditional sense of this word. The theoretical starting point of this idea, followed by the courts as well[55], is that awarding non-pecuniary damages is a special

52 Supreme Court, Legf. Bír. Mfv. I. 10.244/2002/3. sz. EBH 2002 no 695; Supreme Court, Legf. Bír. Mfv. I. 10.744/2006 sz. BH 2007 no 354; Supreme Court, Legf. Bír. Mfv. I. 10.697/2006 sz. BH 2007 no 274.

53 *G. Gellért,* A Polgári Törvénykönyv Magyarázata (2007). Comments on Civil Code 1959, § 355 (4).

54 Civil Code 1959, § 359 (1); Civil Code 2013, § 6:531.

55 Supreme Court, Legf. Bír. Pf. III. 26.339/2001 sz. EBH 2003 no 941.

sanction for wrongful interference with personality rights. This is why damage as a precondition of liability is replaced in the context of non-pecuniary damage with interference with personality rights. The aggrieved person shall be entitled to non-pecuniary damages without proving any actual harm, costs or loss in the traditional sense of the word[56]. This was the starting point of the legislator for the abolition of non-pecuniary damages and replacing them with direct compensation for pain and suffering as a specific sanction for wrongful interference with basic personality rights. The idea behind this change, suggested from the outset, was that awarding non-pecuniary damages is a specific sanction for wrongful interference with basic personality rights and replacing it with this form of direct compensation would result in a clearer system which is free from the conceptual incoherence of postulating damage as a prerequisite for liability for compensating a loss that cannot be expressed and measured in money[57].

IX. Punitive damages?

4/38 If the gain that can be earned by non-compliance with the required duty of care exceeds the damages to be paid as a consequence of wrongdoing, it is worthwhile for the tortfeasor to cause damage. In such a case the obligation to pay damages does not have a preventive effect. This is especially the case if the wrongdoer can earn a great profit by causing damage to a large number of persons but only a small amount to each of them. In such a case the risk of revealing the wrongdoing is small and also the chance is minimal that the victim turns to court. Thus, tort law will be inapt to influence the behaviour of potential wrongdoers. These situations point out the shortcomings of tort law. It may be argued that, for such cases, creating incentives for the victims to turn to court may promote private law enforcement. If such measures are combined with public law elements, the enforcement of law can be effective. This problem comes to the foreground especially in competition law and in consumer protection. Some legal systems solve the problem by awarding punitive damages. Courts, where the legal system accepts such, award punitive damages in order to punish the tortfeasor where compensatory damages do not seem to provide deterrence and a sufficient preventive effect. Punitive damages are damages which are to be paid in addition to compensatory damages and

56 *T. Lábady,* A nem vagyoni kártérítés újabb bírói gyakorlata (1992) 31. See also *F. Petrik,* Kártérítési jog (2002) 74.

57 *Gy. Boytha,* A személyiségi jogok megsértésének vagyoni szankcionálása, Polgári Jogi Kodifikáció 2003/1, 3 ff.

given to the plaintiff as a way of punishing the defendant[58]. The character of punitive damages is of an *accessory* as punitive damages are normally attached to a wrongfully committed tort establishing the defendant's liability and where *aggravating circumstances,* such as deliberate or grossly negligent wrongdoing exist[59]. Punitive damages seek to make the wrongdoing more expensive than avoiding it for the tortfeasor and they create incentives for the prevention of harmful behaviour. Thus, punitive damages may be seen as an important element of the »social engineering« function of tort law. In Hungarian legal theory, some commentators qualify punitive damages as a direct and honest form of non-pecuniary damages including the indemnity replacing non-pecuniary damages in the new Civil Code 2013[60]. This is, however, a misunderstanding. Non-pecuniary damages or indemnity provided for the pain and suffering or other injury of inherent rights of persons may be seen as a tool for providing satisfaction[61] as well, but this does not mean that it would imply a punishment.

4/39 Non-pecuniary damages are primarily of a compensatory character[62] but they imply a redress too which helps to prevent, in general, unlawful behaviour in the future and helps to avoid interferences with the human dignity of others in society[63]. This function, of providing redress beyond compensation, has been stressed in a decision of the Supreme Court awarding non-pecuniary damages to a comatose plaintiff. The Court established that the victim was entitled to non-pecuniary damages even if he was in a coma which prevented him from enjoying any kind of reparation that non-pecuniary damages could have brought to him[64]. The new form of indemnity as a special sanction of wrongful interference with personality rights in the Civil Code 2013, replacing non-pecuniary damages, would not change the functions of non-pecuniary damages. The idea behind the introduction of an indemnity instead of non-pecuniary damages was to relieve the plaintiff of the burden of proving some form of detriment suffered as a result of the defendant's

58 *R. Cooter/T. Ulen,* Law and Economics (2007) 394.

59 *P. Müller,* Punitive Damages und deutsches Schadensersatzrecht (2000) 9.

60 *T. Lábady,* Az eszmei és büntető kártérítés a common law-ban, Állam- és Jogtudomány 1994, nos 1–2, 69 ff.

61 *Lábady,* A nem vagyoni kártérítés újabb bírói gyakorlata 22. *Görög,* Egyetemes eszmei kártérítési alapok, Jogtudományi Közlöny 2004, no 5, 191. *M. Görög,* Immaterieller Schadenersatz oder Schmerzensgeld? in: E. Balogh/A. Hegedűs/P. Mezei/Z. Szomora/J. Traser (eds), Legal Transitions. Development of Law in Formerly Socialist States and the Challenges of the European Union – Rechtsentwicklung in den ehemaligen sozialistischen Staaten und die Herausforderung der Europäischen Union (2007) 297.

62 Constitutional Court of the Hungarian Republic 34/1992 (VI.1.) AB. hat.

63 *Lábady,* A nem vagyoni kártérítés újabb bírói gyakorlata 40.

64 Supreme Court, P. törv. III. 20.703/1989 sz. BH 1990 no 15. The compensatory function has been stressed, however, in another decision, where the Supreme Court subordinated the repressive and preventive function of non-pecuniary damages to the compensatory function of civil law liability. Supreme Court, Legf. Bír. Pfv. IV. 20.419/2006 sz. BH 2006 no 318, EBH 2006 no 1398.

wrongful conduct and making access to indemnification easier. This, however, according to the underlying policy of this change, would not deprive the sanction of its compensatory function although it may inevitably put an emphasis on its repressive character.

4/40 The concept of damage is tightly linked with the concept of damages. Compensation must be provided for any depreciation in value of the property belonging to the aggrieved person and any pecuniary advantage lost due to the tortfeasor's conduct as well as compensation of the costs required for the attenuation or elimination of the pecuniary and non-pecuniary loss suffered by the victim. These provisions not only dictate the principle of full compensation but they also draw the limits of liability as they define damages as compensation for compensable loss. Thus, in Hungarian tort law none of the forms of punitive damages can be awarded. Punitive damages would not necessarily be incompatible with the theoretical and constitutional framework of tort law or the underlying policies of tort law. There are, however, some axioms, primarily the axiomatic principle of preventing victims from gaining profits from their loss, which could be a source of inconsistency if any forms of punitive damages were introduced into Hungarian tort law. It seems that the legislator and legal theorists are reluctant to accept the existence of sanctions with a criminal law character in private law. The main sources of this reluctance may be that sanctions of such a nature in the existing private law (public penalty and disgorgement in favour of the state) did not work properly and their existence has been seen as a relict of socialist state intervention in private law relationships, although this view may not be correct.

4/41 Although punitive damages, as a form of enrichment, may not be unjust as they are awarded by the court (the state) and as such they could not be qualified as unjust enrichment, they conceptually would not seem to be compatible with this principle. Recognising punitive damages would necessarily lead to conceptual inconsistencies in the system of Hungarian tort law. This inconsistency could be avoided if they were paid not to the plaintiff but to a public body for a public purpose[65]. Such a structure may, however, result in losing one of the main advantages of punitive damages, namely creating private incentives for sanctioning wrongful behaviour in society and may call into question the grounds for maintaining such system of damages. Experiences in Hungary with the public penalty would suggest that this is a real possibility. As we saw, however, private enforcement can be improved, where it is necessary, with restitutionary claims as well. Thus, there is no need to break up the structure and framework of private law in order to improve efficiency. This line of thought is also compatible with the requirement of bilateral justification.

65 In some of the states of the USA such solutions have been introduced (state sharing Acts). *D. Brockmeier,* Punitive damages, multiple damages und deutscher ordre public (1999) 16.

4/42 It seems, however, that if the system of tort law is supplemented with unjust enrichment or other doctrines of disgorgement of the profit earned by the tortfeasor at the expense of wrongdoing and is postulated as one coherent system, the law may provide the proper effect of deterrence and prevention without introducing punitive damages. Thus, the efficiency of private law can be improved by maintaining the traditional theoretical framework of private law as well. To come to this result, in Hungarian legal theory, the principle of subsidiarity of unjust enrichment in the context of damages should be reconsidered.

X. Insurance contract law

4/43 Insurance plays an increasingly important role in risk allocation in Hungarian society and the economy. One of the greatest benefits of insurance may be that it not only shifts the risk but also spreads it among the members of the group of society exposed to the same risk. As the insurance company has a right of recourse against the person liable for damage compensated on the basis of insurance, on the basis of an assignment by law[66], the preventive effect of the liability system can be maintained. In such a system, insurance does not eliminate or considerably impede the deterrent function of tort law. The negative effect of insurance on the preventive effect of tort law is not necessarily true even in those cases where this recourse right cannot be enforced. Third-party insurance policies are quite often concluded with risk-bearers who are, in many cases, not the actual tortfeasors, like motor vehicle operators or employers. As far as compulsory third-party motor vehicle insurance is concerned, potential tortfeasors also expose themselves to the risk of personal injury if they are negligent and, if they cause a traffic accident, they have to face criminal liability as well; it is very doubtful whether they consider the existence of insurance coverage while making choices in traffic or maintaining their vehicle.

66 Such statutory assignment is provided in the Civil Code 1959 for first-party and for third-party insurance as well: Civil Code 1959, § 558 (1) and § 559 (3). The Civil Code 2013, § 6:468 does provide this right for first-party insurance but there is no explicit rule providing this right for third-party insurance. It is still not clear if it is to be understood that the recourse claim, as a general rule, is provided for all types of loss-based insurance (which is the preferable interpretation) or it is to be restricted to first-party insurance. As such rights can be provided in the case of third-party insurance in the insurance contract as a claim of the insurance company against the insured person as well, the statutory regulation may be of a minor importance in this context.

XI. Social security law

4/44 In the socialist era, a comprehensive system of social security was built up and this is still functioning, although it provides – in order to create incentives for people to go back to work as soon as possible – only a partial compensation for lost salary. If the personal injury suffered by the victim was partially compensated from the social security budget, courts reduced and continue to reduce the damages awarded to him on the grounds of the prohibition of making a profit on the loss. The principle of full compensation implies that the awarded compensation shall be reduced in accordance with damage that has already been reimbursed from other sources (payments from national health insurance, disability pensions, earnings on the loss, etc)[67]. In this sense social security law and tort law supplement each other.

4/45 As a general rule, the right of recourse under the publicly financed national health care insurance system is covered by the rules of Act no LXXXIII of 1997 on the Services of the Compulsory Health Insurance System. This regulation provides for a right of recourse in respect of services paid by the National Health Care Insurance Fund. As a general rule, the tortfeasor liable for the illness, lost working capacity, injury or death of the beneficiary of the public health care services is obliged to reimburse the cost of services provided on this basis from the Health Care Insurance Fund where liability is established according to the general rules of liability in tort. This provision was presumably not designed for the right of recourse in cases where the patient suffered harm in the course of medical treatment and another social welfare agency contributed to his care or well-being. If, however, the social welfare agency that provided the treatment was part of the public health care insurance system, there is no reason to exclude the application of this rule. If the social welfare agency contributing to the care or well-being of a patient was not part of the national health care insurance system, such rights of recourse are to be assessed under general private law, especially the law of torts and unjust enrichment. If the services were provided under private insurance, the general rules for the right of recourse of private insurers provided in the Civil Code are to be applied.

67 Supreme Court, Legf. Bír. Mfv. I. 10.744/2006 sz. BH 2007 no 354; Supreme Court, Legf. Bír. Mfv. I. 10.332/2000 sz. BH 2002 no 77.

XII. Compensating victims of crimes and catastrophes

4/46 Creating and maintaining specific compensation schemes is a question of policy: it is the choice of the state to decide if social resources shall be used to compensate certain groups of members of society and if so, which type of risks are to be covered in such a manner. As far as catastrophes are concerned, there is no general compensation scheme. In specific acts for certain natural or industrial catastrophes[68] partial compensation is provided, mostly in the form of building houses or giving financial aid. As far as victims of crimes are concerned, there is a regulatory compensation system provided in Act no CXXXV of 2005 on giving help to the victims of crimes and mitigating their loss. Under this statutory compensation scheme, persons suffering serious personal injury or death as a result of a deliberate crime against their life and bodily integrity are entitled to receive compensation from the state budget. The compensation to be provided is a progressively decreasing part of the loss suffered.

XIII. Disgorgement claims

4/47 Disgorgement in favour of the state is a solution to deprive persons of illicit gains if restitution should not be allowed on grounds of public policy. For example, if a contract is invalid and one of the parties performed the contract at least partially, the performing party, as a general rule, is entitled to restitution of the performance. A general problem of contract law (and the same holds true for the law of restitution in general) is whether the performing party, whose conduct under the contract was contrary to public policy, ie it was unlawful conduct or conduct contra bonos mores, should be denied restitution. In cases of illegality, there are special policy issues which would be against the allowance of restitution. Firstly, as a traditional and general principle of private law, no one should be allowed to gain a profit from their own wrongdoing[69]; secondly, allowing restitution would not have a preventive effect against conduct contra bonos mores and even if prevention or deterrence are, in general, not the underlying policies of contract law or unjust enrichment, it is widely accepted that it is desirable to prevent persons from illegal or immoral conduct; thirdly, enforcing restitutionary claims arising from performance of an

68 Eg Government Decree no 252/2010 (X. 21.) on the Hungarian Compensation Fund which was established in order to provide compensation to the victims of an industrial accident in 2010 which resulted in red mud that covered some villages near Ajka. Persons died, suffered injury and lost their homes.

69 Nemo auditur suam turpitudinem allegans.

illegal contract makes it necessary for the courts to go into the detail of the case in evidence to decide the legal ground of the claim which may offend the dignity of the courts. It seems that even if rejecting the restitutionary claims of parties being in pari delicto may protect the dignity of the courts and may provide enough deterrent and preventive effects, the result of allowing the other party to keep the benefits of the performance, even if he also was in pari delicto, cannot be held to be satisfactory at all. If the parties are equally at fault owing to their mutual contract for an illegal purpose, it is a very questionable result that the transferee may keep the transferred benefit even though, by entering into the contract, he acted equally or more wrongfully than the plaintiff did. The Civil Code 1959 solved the problem by introducing a new sanction of invalidity into the Hungarian law. According to this purely repressive sanction, the court was entitled to award to the state the performance that was due to a party who had concluded a contract which was contrary to good morals, who deceived or illegally threatened the other party or who otherwise proceeded fraudulently[70]. A similar rule was applied for disgorgement of the restitutionary value to the state under the unjust enrichment regime[71].

4/48 One weak point of this solution lay in its procedural aspects: it was not obvious at all how courts could award the benefit to the state in a procedure between two parties who would surely not propose such a decision. To award the benefit to the state without a claim would be incompatible with the nature of civil law litigation. This procedural problem has been overcome by giving the public prosecutor the right to claim that the state be awarded the benefit which would otherwise have been passed to the transferee[72]. According to the procedural rules, if in civil law litigation the possibility that an award could be made to the state arose, the court was obliged ex officio to take note and to notify the public prosecutor of the possibility of applying this sanction in order to make it possible for the public prosecutor to step in. The restitutionary benefit could then be awarded to the state on the claim of the Public Attorney. This claim was a procedural precondition for such a decision.

4/49 The Civil Code 2013[73] abandoned this special sanction of disgorgement in favour of the state. The main arguments for this proposal are the punitive character of it, which was held to be incompatible with the structure and nature of the civil law and that it was applied very rarely and unsuccessfully.

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70 Civil Code 1959, § 237 (4). *S. Beck,* Turpis causa – követelési jog? Jogtudományi Közlöny 1922, no 7, 52 f; *T. Almási,* Commenting on the presentation of Schuster Rudolf, Magyar Jogászegyleti Értekezések X. 1914, 23.

71 Civil Code 1959, § 361 (3).

72 Civil Code 1959, § 237 (4).

73 The Official Explanatory Notes stress that such repressive sanction would not only be incompatible with the internal logic of private law, but neither practical nor conceptual arguments would support keeping it.

XIV. Criminal law

4/50 Criminal law plays an important role in the protection of rights and legal interests of persons, which is the task of the law as a whole. It is often said that one of the differences between criminal law and private law is that the basic aim of criminal law is deterrence, while the basic aim of private law is providing restitution or compensation in the case of unlawful interference with protected rights of others. This view may be correct on a certain level but the ultimate goal of law in general is to influence the behaviour of members of society and this is common in private law and in criminal law as well. On this level, the main goal of private law and criminal law is the same: preventing wrongdoing. Criminal law and private law can be closely connected on the level of procedural law as well; compensation claims may be judged and damages may be awarded by the criminal court, via criminal procedures, to the victims of crimes. Although criminal courts are reluctant to use this opportunity and leave the claim for damages to the civil courts, this may lead to the development of a new area of tort law in Europe as well, parallel to the claims under the Alien Tort Claims Act in the United States. If criminal law allows plaintiffs to bring cases to the court where a foreign citizen committed crimes in another country against people there (especially for violations of human rights), this may open the way for deciding claims for damages in these cases as well[74].

74 *E. Engle,* Alien Torts in Europe? (2005) 7.

Part 3 The tasks of tort law

I. Compensatory function

4/51 The compensatory function of tort law was always beyond doubt in Hungarian legal theory and court practice. The starting point of the Civil Code 1959 was that providing compensation is directly addressed by civil law liability while prevention is an indirect function of tort law. It is in line with the structure of private law and the market that primarily private law has to provide reparation of injustice, restoring the disturbed balance of patrimonial relationships. This is clearly established with the principle of full compensation: damages are to bring the victim into the same position as if the damage had not occurred[75]. The compensatory function of tort law is less obvious in the context of non-pecuniary damages. Non-pecuniary damages are to be paid for losses that are not transferable rights and are not capable of being expressed in money. Thus, it seems that the law should measure in money something that cannot be measured in money, which makes it unclear how they should be calculated in order to provide compensation or whether this is possible at all. Due to this contradictory nature of non-pecuniary damages, in Hungary it is now considered that non-pecuniary loss is not damage in the traditional sense of the word and non-pecuniary damages are not paid as compensation but much more as a redress or satisfaction.

II. Function of deterrence and continuation of a right (Rechtsfortsetzungsfunktion)

4/52 According to the view underlying Hungarian tort law rules, the primary goal of tort law is providing compensation. Prevention is a secondary role but these two aims are tightly connected and cannot be seen independently of each other. The compensation provided to the victim also has a deterrence function ie to deter others in society from doing wrong. Providing compensation improves the protection of members of society, while deterrence aims to prevent wrongdoing[76]. Notions of continuation of a right or equivalent doctrines are not established in Hun-

75 Official Explanatory Notes for the Civil Code 1959, 365.
76 Official Explanatory Notes for the Civil Code 1959, 365 f.

garian tort law. In the course of assessing damage, courts and legal theory refer directly to the principle of full compensation and to the principle of not enriching the victim who suffered the loss. Courts try to assess damage on an objective basis but they do so without referring to the continuation of rights.

III. Penalty function

4/53 A penal function has never been accepted as part of Hungarian tort law. Although penalties may support or supplement tort law in order to achieve the goal of prevention, tort law itself does not have such a function.

4/54 In establishing the private law consequences of unlawful interference with personality rights, the Civil Code 1959 provided[77] that if the defendant interfered wrongfully with the plaintiff's inherent rights and the sum to be awarded as damages would not be proportionate to the gravity of the wrongfulness of the tortfeasor's conduct, the court could impose on the defendant a fine to be devoted to a public purpose[78]. The underlying policy behind this repressive sanction was the recognition of the fact that, in cases of gross infringements of the plaintiff's personality rights, damages may not properly transmit the social evaluation of the wrongful conduct and this would not result in a proper level of protection of personality rights and prevention[79]. This specific penalty was not successful as courts were reluctant to apply it and it was not upheld in the Civil Code 2013.

4/55 There are arguments in Hungarian tort law theory that there is a penalty function attached to non-pecuniary damages and to the indemnity compensation to be introduced in the Civil Code 2013 as a specific sanction for wrongful interference with inherent rights replacing non-pecuniary damages. This is, however, a misunderstanding of punitive damages and a wrong approach which qualifies satisfaction or redress as a punishment. The new sanction of indemnity compensation introduced in the Civil Code 2013 is not attached to damages but is a direct consequence of wrongful interference with inherent rights of persons. This, however, does not mean that it has a punitive character.

4/56 It may be an inapt approach to use only compensation and punishment in order to describe the functions of damages. Just and fair satisfaction or redress should or could also be postulated as autonomous functions of damages. Pro-

77 Civil Code 1959, § 84.

78 The Civil Code 1959 was amended with this special sanction for wrongful interference with personality rights under a comprehensive revision in 1977 in order to provide a more effective protection of personality rights with proper preventive effect.

79 Official Explanatory Notes for Act no IV of 1977, 455.

viding satisfaction does not mean compensation, because it does not restore the original state but neither is it punishment because it is to be paid in order to give something as an »exchange« for the loss and it does not necessarily depend on the degree of fault of the tortfeasor. This is well presented in the system established by the European Convention on Human Rights: the European Court of Human Rights may order the state to pay a just and fair satisfaction as a consequence of non-compliance with the duties established in the Convention. This satisfaction is not to compensate the plaintiff, because it is not to restore the plaintiff's loss and to bring him into a position as if the interference with human rights had not occurred but rather it is about giving him something in order to mitigate or eliminate the consequences of wrongful interference with his protected rights and to prevent the state from doing this again. Thus, the proper view might be that this supplements the system of possible functions of tort law and that such is to provide compensation, punishment or (just) satisfaction. Non-pecuniary damages and the indemnity compensation replacing them in Hungarian tort law have the function of providing just and fair satisfaction; they are not compensation, because they are not to be paid as a money equivalent of the loss caused. They are not, however, punishment either, because primarily they are not to be paid in order to impose a sanction on the wrongdoer but to give something to the victim in order to eliminate or reduce the loss he suffered.

IV. Economic optimisation?

Economic analysis of law may provide important insights on how tort law works and which effects it may have. The literature of law and economics delivers important and useful results and court practice can also develop and apply legal solutions presenting the same way of thinking, as has been done by the famous American judge, *Learned Hand* when he established the »Hand«-rule[80] long before the flourishing of the economic analysis of law. The efficiency based approach may lead to the conclusion that prevention is the main function of tort law and punitive damages may be a useful tool for improving this, especially where private (law) enforcement comes to the foreground[81]. **4/57**

A general principle of Hungarian tort law is that no-one shall be enriched by his own damage. It seems that restitutionary damages or claims for a shifting of the gain from the tortfeasor to the victim in order to deprive the tortfeasor of the **4/58**

80 *United States v. Carroll Towing Co.* 159 Federal Reporter, Second Series (F.2d) 169 (2d Cir. 1947).
81 *Cooter/Ulen,* Law and Economics (2007) 394.

profit he gained from the *wrongful conduct* (Gewinnabwehr) should be kept compatible with the principles and policies underlying tort law[82].

4/59 Economic analysis of law, however, does not play a significant role in Hungarian court practice and in legal theory, although it could be an important source for improving the theory of tort law in the Hungarian jurisdiction as well. The approach that a causal link may be established on the basis of increased probability (making theories of causation superfluous), considering loss of a chance as damage or a natural cause, assessment of damage, especially pure economic loss, establishing fault *(Hand formula),* understanding strict liability, the role of insurance, etc, are only some of the important fields and problems of tort law where economic analysis may bring important results in order to improve tort law theory and practice.

82 *Marton,* A polgári jogi felelősség (1993) § 117.

Part 4 The area between tort and breach of an obligation

I. Tort, breach of contract and an interim area

The underlying policy behind the regulation of damages in the Civil Code 1959 was providing a unified system of liability. This idea included the unitary regulation of liability for torts and breach of contract[83]. This solution reinforces the idea that the moral basis of liability is common, as it is always a breach of an obligation, whether the obligation rests on a contractual promise or in the law itself. It makes the system simpler as well, as it avoids borderline problems and the necessity of classification. This structure eliminated the problems resulting from the fluid transition area between tort and breach of contract. Due to this structure, problems of delimitation have not emerged in Hungarian court practice and establishing the strict point of time of conclusion of a contract has not been a key issue. **4/60**

The Civil Code 2013 has not maintained this unified system. On implementing the system of liability for breach of contract provided in the CISG (United Nations Convention on Contracts for the International Sale of Goods), the legislator decided to introduce the foreseeability limit as a statutory limitation of liability for breach of contract in Hungarian contract law[84]. Moreover, the preconditions of exoneration have also been designed differently. Proving compliance with the required standard of conduct is not enough for the party breaching the contract to be relieved of liability; instead he has to prove that the breach was due to circumstances unforeseen at the time of contracting, that fell outside his scope of control and that he could not have been expected to avoid the circumstances or prevent the loss it caused[85]. This necessarily results in breaking up the logic of the unified system of liability and also results in a system of non-cumulation[86]. The idea behind introducing the foreseeability limit and creating different regimes of liability was that, in the case of a contract, the duty is undertaken by the party voluntarily as part of a bargain. The bargain reflects market mechanisms only if the obligation was undertaken by a properly informed party because only risks that were re- **4/61**

83 If not otherwise provided, the rules of delictual (tort) liability are to apply to liability for breach of contract as well. Civil Code 1959, § 318 (1).

84 Civil Code 2013, § 6:143.

85 Civil Code 2013, § 6:142.

86 The rule of non-cumulation is explicitly provided in the Civil Code 2013 preventing the aggrieved party having a claim enforced in tort if damages for breach of contract would be the proper remedy; Civil Code 2013, § 6:145.

vealed can be priced by the parties in an exchange. The legislator wanted to create a system which induces the parties to disclose risks if they want to make such part of the bargain. The separate regulation of liability in tort and liability for breach of contract will create problems of delimitation.

4/62 Due to the unified system of liability in tort and liability for breach of contract, the question of whether they represent different levels of protection or are built upon different inner logic and structures did not arise. The new structure of liability separating tort and breach of contract will pave the way for such questions. Structurally it is built upon the assumption that it is always possible to draw a clear line between situations where there is a contract between the parties and where there is not. In the chain of steps leading to the conclusion of a contract, a point of time of contracting is postulated. Assuming a valid contract, after this point of time there are contractual rights and obligations between the parties, while before that, there are not. As cases of both consumer contracting and commercial contracts show, the picture is not always that clear. As experiences of jurisdictions not allowing cumulation of claims show, it is difficult to assess. Providing the proper model of consumer mass transaction may still cause problems today (eg the decisive final moment of contracting, shrink wrap licenses, etc). Mergers and acquisitions are based on transactions which are the result of a sophisticated process involving many steps. In cases of contracts for developing software, it quite often occurs that defining the content of the contract, the performance, requires cooperation between the parties. The seller actually often already starts to perform at a stage which is still to be seen as a preparatory phase prior to contracting. In the deal-is-on-philosophy of commercial contracting, if the parties agreed that performance is to be started by any of them, the conclusion of the contract can be established even in the absence of an agreement upon the price. A further problem is that a duty of care vis-à-vis the other party can also be established by the law (eg not to cause damage to property of others) triggering liability in tort and this has been clarified by the general rule of the Civil Code 2013 that causing damage unlawfully shall be prohibited by law[87]. These examples and many others show that a clear line between contractual obligations and duties imposed by the law on the parties cannot always be drawn.

87 Civil Code 2013, § 6:518.

II. Groups of cases in the interim area

Thus, an interim area between tort and breach of contractual obligation does exist. **4/63**
Prospectus liability did not emerge as a specific group of cases of this interim area of contract law, nor has the problem of the relationship of the parties and court-appointed expert witnesses been addressed in Hungarian court practice or theory so far. Similarly, no doctrine on culpa in contrahendo has been elaborated. Non-compliance with the duty of care in regard of a partner's person and property and of pure economic interests triggers liability in tort. Due to the unified system of contractual liability and liability in tort, the fact that such duties imposed on the party by the law emerged in a pre-contracting phase did not make a difference for the courts.

Cases of *culpa in contrahendo* are not covered by specific provisions. It is explic- **4/64**
itly provided that contracting parties shall be obliged, also before contracting and including the contractual negotiations, to cooperate and disclose to each other every relevant circumstance of the contract[88]. This is a general duty of disclosure concretising the principle of good faith and fair dealing for contracting situations. The consequence of non-compliance with this duty is a claim for damages in tort. *Eörsi* emphasises that in Hungarian tort law there is no gap that should be filled by the culpa in contrahendo doctrine. He explicitly refers to the basic norm of liability provided in the Civil Code 1959, § 339, the principle of good faith and fair dealing and the duty to cooperate in the Civil Code 1959, § 4 (2) in order to establish liability for cases qualified as culpa in contrahendo in German court practice and literature[89].

In Hungarian court practice, a specific group of cases has emerged where the **4/65**
court had to decide whether costs of tendering must be compensated if a tender is cancelled. The question was whether a party making a bid or a tender had the right to have his costs compensated if the tender was cancelled or revoked and the costs of making the bid were spent in vain. It has been made clear that if the invitation or the decision on the tender was unlawful, this unlawfulness establishes the liability of the offeree according to the general rule for fault-based liability in tort. This liability, however, covers only the compensation for the costs of preparing and submitting the bid (negatives Interesse) but does not cover compensating the bidder for lost profits. In these cases, a causal link can never be established[90].

88 Civil Code 1959, § 205 (4).

89 According to *Eörsi,* in German legal theory and practice it was necessary to develop such a doctrine because of the gap the rules of liability for tort and for breach of contract left in the BGB. Because of the general clause of liability in the Civil Code 1959, § 339 such a gap does not exist in Hungarian private law. Since these cases are covered by the Civil Code 1959, § 339, it was not necessary to develop such a doctrine. *Gy. Eörsi,* Elhatárolási problémák az anyagi felelősség körében (1962) 181 ff.

90 Supreme Court, Legf. Bír. Gf. V. 30 626/1984 sz. BH 1985 no 475; Supreme Court, Legf. Bír. Gf. I. 30.995/1994 BH 1996 no 108; Supreme Court, Legf. Bír. Gfv. IX. 30.030/2005 sz. EBH 2005 no 1220; BH 2005 no 364.

4/66 A specific group of cases, still belonging to the interim area, is *liability for information.* Allocation of information is one of the most sensitive problems of contract law. The decision of an uninformed party is not a free choice, which may mean that the market as the economic environment of the contract was imperfect. Sustaining free choice and market mechanisms would justify a requirement to ensure that the parties are in a properly informed position. Information asymmetry may be seen as a market failure which should be corrected. On the other hand, a general obligation to share all information possessed by the parties would discourage investing in the production of information which would entail the consequences of impeding innovation. Up to a certain extent all of the legal systems provide, impliedly or explicitly, for establishing a duty of disclosure in the pre-contracting stage while they also try to set the boundaries of this obligation. The Civil Code 1959 explicitly required parties to inform each other on all the relevant circumstances of the contract and the rule has been retained in the Civil Code 2013[91]. The consequence of non-compliance with this duty may be a ground for unenforceability of the contract for mistake or misrepresentation and/or it may be a basis for damages in tort or a remedy for breach of contract as an alternative to unenforceability for mistake or misrepresentation.

4/67 In cases where the party (typically the seller) provides information regarding the product to be the subject of the contract, the information requirement may be inferred as a contractual term and as being part of the contract[92]. This construction establishes the contractual liability of the party if the product fails to meet the alleged quality. In such cases unenforceability of the contract on the ground of error, misrepresentation or deceit and a remedy for breach of contract are alternative claims open to the plaintiff. Unenforceability of the contract excludes the liability for breach of contract; unenforceability of the contract does not, however, exclude the claim in tort or on the basis of induced behaviour (Civil Code 1959, § 6).

4/68 In the Civil Code 2013, creating different regimes for tort and for breach of contract also required a specific regulation of culpa in contrahendo. According to this new regime, if a party fails to comply with the required duty of cooperation and duty of disclosure in the pre-contractual stage, his liability depends on whether the contract had been concluded or not. If the contract had been concluded, his liability falls under the regime of liability for breach of contract; if the contract had not been concluded, his liability falls under tort law[93]. The duty of cooperation and disclosure of relevant facts is provided in the Civil Code 2013 as a general duty imposed on the negotiating parties independently of whether the

91 Civil Code 1959, § 205 (4); Civil Code 2013, § 6:62 (1).

92 Civil Code 1959, § 277 (1) b. Also in the absence of such an explicit provision, the construction of the contract may establish the same result in practice.

93 Civil Code 2013, § 6:62.

contract is ultimately concluded or not. It is the regime of liability which is different if a party failed to comply with such a duty. If the contract had been concluded, the new regulation extends the scope of the contract in this context to the pre-contractual stage.

III. The problem of concurrent claims

4/69 The liability system of the Civil Code 1959 allowed the concurrence of contractual and non-contractual (tort) liabilities. Court practice in Hungary also seemed to accept the concurrence of contractual and non-contractual liability. The Civil Code 1959, § 318 provided that, as far as liability for breach of contract is concerned, the same rules were to apply as for liability in tort with the exception that the court did not have the right to reduce liability on equitable grounds. The basis of liability in contract and in tort was different as it was the breach of the contractual duty in contract and non-compliance with the implied general prohibition of causing harm to others in tort; but beyond and in spite of this difference, the applicable rules for damages were the same. Due to this unified system, it was primarily a question of argumentation for establishing the claim (for the party) and the judgment (for the court) on breach of contract or on tort. The plaintiff was not prevented from having a claim in tort even if the defendant's conduct which caused harm was a breach of contract. Moreover, since in Hungarian case law the court shall not be bound to the title represented by the plaintiff as a ground for his claim, the court may consider, even without any request by the parties, the preconditions of tort liability as well even if the plaintiff relied only on the defendant's breach of contract[94]. Earlier court practice was somewhat confusing, since decisions were often based on the general rule of liability[95] and not on the special rule for contractual liabilities[96], even in cases of contractual liability. At the beginning of the seventies, a tendency could already be detected towards preferring the contractual basis in cases of concurrent grounds for liability[97]. This tendency has developed to a clear standpoint. If there was concurrence of contractual and non-contractual (tort) liability, courts in contractual cases applied the specific rule for contractual liability by referring to the general rule of liability in tort as well and deciding cases on the basis of contractual liability[98]. One obvious and signifi-

94 *A. Menyhárd,* A kártérítési jog egyes kérdései, Polgári Jogi Kodifikáció 2004, no 1-2, 47.
95 Civil Code 1959, § 339.
96 Civil Code 1959, § 318.
97 *A. Harmathy,* Felelősség a közreműködőért (1974) 202.
98 *J. Gyevi-Tóth,* A szerződéses és a deliktuális felelősség egymáshoz való viszonya, Jogi Tanulmányok 1997, 178.

cant difference had, however, been clearly developed in court practice. This difference was the application of different measures for exculpation as in contractual cases courts applied stricter tests in the course of assessing whether the tortfeasor had acted as would be generally expected under the given circumstances. They allowed exculpation only if the defendant could prove that the harm under the given circumstances would have been unavoidable[99]. This tendency and the obvious difference in relationship of the contracting parties on the one hand and non-contractual situations on the other hand, which also involved different limitation measures such as the foreseeability doctrine for contractual damages, led the Hungarian legislator to the conviction that the unified system should be replaced by the division of contractual and non-contractual liability, even if they would basically remain congruent with respect to the measure of damages. Regulations on compensation, with the exception that the scope of the foreseeability principle is somewhat different, are also the same for contractual and for non-contractual liability in the Civil Code 2013. The system in the Civil Code 1959 did not prevent the court from establishing non-contractual liability if the wrongdoer's conduct could be qualified as a breach of contract but at the same time, independently of the contractual obligations undertaken by the defendant or other persons, it could be qualified as a wrongful act resulting in liability in tort as well. In such cases the plaintiff could choose the basis of his claim[100]. The separate regulation of liability in tort and for breach of contract in the Civil Code 2013 does not make this possible due to the »non-cumulation« principle. This system follows a clear logic but will presumably create many problems of delimitation in practice in the course of the application of the Civil Code 2013[101].

99 *I. Kemenes,* A gazdasági szerződések követelményei és az új Ptk., Polgári Jogi Kodifikáció 2001/1, 9.
100 *Eörsi,* Elhatárolási problémák az anyagi felelősség körében 33 ff.
101 Civil Code 2013, § 6:145.

Part 5 The basic criteria for a compensation claim

I. Damage

Socialist theorists, namely *Eörsi,* stressed the preventive function of tort law and put wrongfulness at the centre of the system of tort law instead of damage. This may be a reason why damage never became a central issue of tort law in legal theory. The concept of damage in Hungarian tort law is defined with damages. The tortfeasor who is responsible for the damage shall be liable for restoring the original state, or, if this is not possible or if the aggrieved person on a reasonable ground refuses restoration, he shall compensate the victim for pecuniary and non-pecuniary damage. Compensation must be provided for any depreciation in the value of the property belonging to the victim (damnum emergens) and any pecuniary advantage lost due to the tortfeasor's conduct (lucrum cessans) as well as compensation of the costs necessary for the attenuation or elimination of the victim's pecuniary and non-pecuniary loss[102]. The concept of lost pecuniary advantage as a specific type of damage also implies that damage is a legal and not a natural concept[103]. Neither an economic definition nor concept has been elaborated or applied in court practice or legal theory. The distinction between recoverable and non-recoverable loss is implied in court practice, although this distinction has also never been elaborated in court practice or in legal theory. Losses, however, of gains which are to be deemed morally unacceptable are not to be compensated, although it may be difficult to assess if losses are morally acceptable or not. It is still not clear whether gratuities[104] paid to a doctor is a compensable loss but the tendency seems to be to accept that it is so. In a decision, the Supreme Court rejected a claim for awarding compensation to a patient for gratuities paid by him **4/70**

102 Civil Code 1959, § 355 (1) and (4).

103 *H. Koziol,* Österreichisches Haftpflichtrecht I (1997) no 2/8.

104 Doctors working as employees of public health care providers (hospitals) normally receive gratuities from patients. The basis of this »custom« is the general necessity of compensating doctors for their generally low level of salary. This type of income has always been morally questionable and doctors are also divided on this. Some of them expect to get such an extra payment while others refuse it on moral grounds. Doctors are obliged to provide services to patients according to the highest possible level without demanding or getting any extra fee from patients. Doctors working under the Public Health Insurance Service system are not supposed to ask for any kind of extra payment, fee or other material advantage as a counter-value for their services to the patient and they are prohibited from subjecting their services to the condition of getting such material advantages. Doctors working as employees of hospitals are obliged to do their work on the basis of this relationship but they are not prohibited from accepting such gratuities after the treatment.

to a doctor but declared that such payments should not be deemed illegal. According to the judgment, such gratuities are not prohibited and should not be deemed illegal payments insofar as they are paid at the personal discretion of patients[105].

4/71 According to the prevailing view in Hungary, compensating non-pecuniary loss does not fit into the concept of damage. It was the idea of the legislator in 1959, in line with the legal theory of former private law, that there was neither a need to accept non-pecuniary damages nor was it coherent, as values that could not be expressed in money could not be compensated. Thus, the concept of non-pecuniary damages suffered from serious inherent contradiction. The protection of such values should and can be provided properly in public law, especially in criminal law. It was also believed that interference with non-pecuniary interests mostly involved interference with pecuniary ones. This left the way open for the courts to award higher compensation amounts for pecuniary loss if non-pecuniary values were also interfered with, in the form of general damages which then implied compensation for the violation of the non-pecuniary interests too. This view proved to be unsustainable in the longer run and in 1977 the Civil Code 1959 was amended with provisions covering non-pecuniary damages. These provisions, in order to exclude insignificant interference with protected interests from the compensation regime, required a certain level of violation of interests in order for one to get interference compensated. In 1992 the Hungarian Constitutional Court established that imposing restrictions on the availability of non-pecuniary damages provided a lower level of protection for inherent rights of persons than was required and declared these provisions incompatible with the Constitution[106].

4/72 Court practice clearly tended to require wrongful interference with the victim's inherent rights as a necessary precondition for awarding non-pecuniary damages. This view is also supported by the Civil Code 2013 which abolishes non-pecuniary damages and replaces them with a direct indemnification regime as a specific sanction for wrongful interference with personality rights. It is expected that this form of direct compensation should result in a clearer system which is free from conceptual incoherence when it comes to speaking of damage as a prerequisite for liability for compensating a loss that cannot be expressed and measured in money[107]. As is accepted both in theory and practice, the basis of compensable non-pecuniary loss is the unlawful interference with the inherent rights of the person. The question is only whether wrongful interference with personality rights is a non-pecuniary loss *per se* to be compensated by awarding non-pecuniary damages, as has been stressed in prevailing theory and in the preparatory materials for the Civil Code (2013), or whether an additional manifest disadvantage is required

105 Supreme Court, Pfv. X. 24.130/1997 sz. EBH 1999 no 18.
106 Constitutional Court of the Hungarian Republic 34/1992 (VI.1.) AB. hat.
107 *L. Vékás* (ed), Szakértői Javaslat az új Polgári Törvénykönyv tervezetéhez (2007) § 2:121.

as has been stressed in some decisions of the Supreme Court[108]. The new form of indemnification, based on a similar concept to Schmerzensgeld, does not require a manifest disadvantage to be suffered by the victim. The amount awarded is to be established by the court having regard to the circumstances of the case, especially the gravity of the interference with the victim's inherent rights, whether the wrongdoing happened repeatedly, the level of fault of the wrongful conduct and the impact of the interference on the victim and on the victim's environment[109].

4/73 The Civil Code 1959 and the Civil Code 2013 both protect inherent rights of persons with a general clause. From this follows that there is no need to refer to certain specific rights interfered with in order to establish wrongful interference with inherent rights of persons. These rights are generally protected by the law whether defined specifically in the Civil Code or other legislation or not. From the general approach that wrongful interference with inherent rights of a person may establish non-pecuniary damage, it followed already in the course of application of the Civil Code 1959 as well that there was no need for specifically defined protected interests in order to award non-pecuniary damages. As, however, non-pecuniary damages were a special sanction of wrongful interference with personality rights, there was, in this context, a difference between damage to »persons« and damage to property.

4/74 As to the assessment of the amount of damages, the general approach was that the court has to consider all the circumstances of the case. It was also accepted in Hungarian court practice and legal theory that non-pecuniary loss cannot be expressed in money.

4/75 The level of compensation awarded for non-pecuniary loss was very low in the socialist era but currently presents a steadily increasing trend. However, it does not match up to the sums awarded in societies with higher standards of living. This may be a source of tension on a European level. Courts try to adjust the amounts awarded to the general ability of society to bear such burdens (in order not to make insurance too expensive and to avoid making the price and cost of services too high through the incorporation of insurance premiums). There is no catalogue for calculating the amount of non-pecuniary losses although in practice it works similarly to the calculation of compensation in insurance practice. Courts try to award similar amounts of compensation for similar non-pecuniary losses in compliance with the basic structural principle of equal treatment of equal situations, taking into account the relevant personal circumstances and peculiarities as well and awarding higher sums for a violation of an interest protected to a

108 Supreme Court, Legf. Bír. Pfv. IV. 20.419/2006 sz. EBH 2006 no 1398 and BH 2006 no 318; Supreme Court, Legf. Bír. Pfv. III. 24.313/1998 sz. BH 2001 no 12.

109 Civil Code 2013, § 2:52 (3).

higher degree[110]. There are no fixed, suggested or even published sums and there may be considerable differences in the practice of lower courts which makes predictability difficult.

4/76 The question of who can claim compensation for non-pecuniary loss is a sensitive one in all legal systems. Some decades ago the starting point of the Hungarian court practice on this issue was that grief and pain arising from the loss of a relative itself is not a sufficient basis for compensable non-pecuniary loss[111]; this approach has, however, been changing. Today, claims for compensation of non-pecuniary loss of close relatives of the deceased person are accepted in court practice[112], although their scope is limited. The ground for awarding damages to relatives is the loss of the victim, ie their protected interest in their right to live in a complete and healthy family. For this reason, in court practice parents, minor children, spouses and brothers are entitled to damages arising from the death of the victim. For such relatives the bereavement itself is the basis for claiming compensation for non-pecuniary loss[113]. Courts are not inclined to widen this circle and have rejected claims of grandparents as well as those of an adult child who no longer lived together with the victim[114]. If the case does not concern the loss of a relative but rather the loss suffered by the relative (eg personal injury or health damage), the relatives of the direct victim may have a claim for non-pecuniary damages as compensation for their own personal loss (eg for giving birth to a child with a cognitive disability)[115].

4/77 Thus, in Hungarian legal theory and practice, non-pecuniary damages were not compensation for emotional distress but compensation for wrongful interference with rights (ie personality rights). Emotional distress, shock, pain, suffering, bad feelings, frustrated expectations, and lost experiences might not be sufficient ground to award non-pecuniary damages. Suffering psychical burdens and mental pain may be used as an argument to support the judgment[116] or as a basis to es-

110 Supreme Court, Legf. Bír. Pfv. III. 20.991/1994 sz. BH 1997 no 226; Supreme Court, Legf. Bír. Mfv. I. 10.708/1998 sz. BH 2000 no 569.

111 Supreme Court, Guideline no 16 (no longer in force).

112 Supreme Court, Legf. Bír. Pfv. III. 21.354/1991 sz. BH 1992 no 529 (awarding non-pecuniary damages to a child for losing his parents); Supreme Court, Legf. Bír. Pfv. III. 21.795/1998 sz. BH 2001 no 14 (awarding non-pecuniary damages to parents for losing their child).

113 The claim for compensation of non-pecuniary loss on the basis of losing a brother has been explicitly accepted in court practice. Supreme Court, Legf. Bír. Mfv. I. 10.655/2007 sz. BH 2009 no 27.

114 Memorandum on the National Discussions of 23 – 25 January 2008 of the High Courts' Civil Law Colleges and the Civil Law College of the Hungarian Supreme Court.

115 Eg Supreme Court, Legf. Bír. Pfv. III. 24.931/2002 sz. BH 2005 no 18; Supreme Court, Legf. Bír. Pfv. III. 21.212/2008 sz. BH 2009 no 208; Supreme Court, Unificatory Resolution no 1/2008, 12 March 2008.

116 Supreme Court, Legf. Bír. Pf. III. 24.737/2002 sz. BH 2005 no 105.

tablish[117] mental illness. The only exception was non-pecuniary damages for lost holiday experiences and recreation of working power. This was established by the Supreme Court[118] some years before the ECJ's judgment in the *Leitner* case[119]. It is difficult to trace back the development of this specific doctrine in Hungarian law. One root for this could be the rejection of compensating non-pecuniary disadvantages which prevailed until the amendment of the Civil Code in 1977. Another is the general difficulty all legal systems have to face in looking for the boundaries of compensable non-pecuniary losses. The amendment of the Civil Code in 1977 set these boundaries by requiring a significant or permanent personal injury or social disadvantage as a precondition for awarding non-pecuniary damages which also provided a definition of compensable non-pecuniary loss. The third one is the decision of the Hungarian Constitutional Court[120] which eliminated this definition and the boundaries implied in that from the Civil Code 1959 but gave another one. The concept of non-pecuniary damages provided by the Constitutional Court has been built upon the perception that typical cases of non-pecuniary damages involve personal injury, health damage, interference with good reputation, violation of freedom of speech, etc, which are protected inherent rights of persons in the part of the Civil Code covering the law of persons. As the idea that, in the context of non-pecuniary damages, compensable non-pecuniary loss, due to its immaterial nature, cannot be defined as damage did not allow a channelling of the definition of unlawfulness into the general doctrine that causing damage shall be deemed unlawful even if there is no explicit norm that has been violated, this concept also helped to adapt non-pecuniary damages to the structure of tort law. This new concept also provides the necessary limitations, implies a logical structure and was quickly accepted by both courts and theory[121]. From this follows that only detriments which could be described as interferences with protected inherent rights of the person can be a basis for awarding non-pecuniary damages. In this logic, the court may award non-pecuniary damages for emotional distress, shock, pain, suffering, bad feelings, etc only if an inherent right of a person to live without distress, fear, pain, suffering, bad feelings, etc can be established. As such

117 Supreme Court, Legf. Bír. Pfv. III. 21.147/2005 sz. BH 2007 no 6.

118 In a decision from 1998, the Hungarian Supreme Court awarded non-pecuniary damages to a plaintiff on the ground that the defendant travel agency failed to inform the plaintiff about the difficult conditions for approaching the rented resort house located at the top of a hill, far from the village. The Court found that, since the plaintiff could not spend his holiday in a quiet place as he contracted for with the travel agency, he lost his possibility of recreation and lost the holiday experiences as well as the entertainment and relaxation of a holiday abroad. Supreme Court, Legf. Bír. Pfv. VIII. 23.243/1996 sz. BH 1998 no 278.

119 ECJ preliminary ruling 12 March 2002, in case C-168/00, *Simone Leitner v. TUI Deutschland GmbH & Co. KG*.

120 Constitutional Court of the Hungarian Republic 34/1992 (VI.1.) AB. hat.

121 *Lábady,* A nem vagyoni kártérítés újabb bírói gyakorlata (1992) 32.

rights are still not recognised in Hungarian law (they may ensue in the future), such detriments may be compensated by non-pecuniary damages if they cause health damage (mental illness) as this involves a protected inherent right of persons. The requirement of interference with inherent rights of persons became a general requirement for awarding non-pecuniary damages but court practice was inconsistent on the issue of whether an additional manifest disadvantage is a requirement for awarding non-pecuniary damages or whether a wrongful interference with protected inherent rights of the person *per se* establishes such a claim (as was suggested by the Constitutional Court in expressing its intention to provide complete protection of such rights). One of the primary aims of the legislator in introducing indemnification as a replacement for non-pecuniary damages was to solve this problem and to make it clear that no additional manifest disadvantage is required for awarding compensation for wrongful interference with inherent rights of persons protected by the law.

4/78 As the structure of protection of personality rights is based on a general clause and on open concepts, the courts may create personality rights, as for example they did with the right to education[122] in order to establish claims for non-pecuniary damages where they think it fit or to reject the claim with reference to the absence of interference with inherent rights where they do not want to award non-pecuniary damages. In a case establishing that giving life to a healthy child may not be a ground for awarding non-pecuniary damages[123] the Supreme Court avoided establishing its judgment upon moral assessment, arguments about the concept of damages or the moral value of birth and life and concluded that the plaintiff could not show that her personality rights had been interfered with. The right to family planning was referred to in the unificatory resolution of the Supreme Court covering wrongful life claims and the right to live in a complete family is also the basis for awarding damages to relatives of direct victims of accidents and other interferences with personality rights[124]. In the course of awarding damages for loss of convenience and leisure time in the context of travel contracts, however, the court did not explain the decision as a violation of personality rights. Thus, there still seem to be some doctrinal inconsistencies in court practice.

4/79 Although it has been argued that in the context of non-pecuniary damages the damage as a precondition for liability should be replaced by wrongful interference with the victim's personality rights and the aggrieved person should be entitled to claim non-pecuniary damages without proving any actual harm, costs or loss

122 Supreme Court, Legf. Bír. Pf. IX. 26.426/2001 sz. BH 2004 no 235.

123 Supreme Court, Legf. Bír. Pf. III. 26.339/2001 sz. EBH 2003 no 941 and BH 2004 no 143.

124 Supreme Court, Legf. Bír. Pfv. III. 20.436/2010 sz. BH 2011 no 248; Supreme Court, Legf. Bír. Pfv. III. 20.650/2009 sz. EBH 2009 no 2043.

in the traditional sense of these words[125], this view is yet to be accepted in court practice. In order to award non-pecuniary damages as compensation for mere fear, this would postulate pre-qualifying fear as a wrongful interference with personality rights of the victim. Court practice, despite the fact that there are decisions of lower courts showing some inclination to move in this direction[126], does not seem to accept such extension of the concept of personality rights or the concept of non-pecuniary loss. If fear results in a normally compensable loss, eg depreciation of the value of land (eg because of alleged radiation from a working mobile phone transmission tower built on the neighbouring land)[127] or in a psychiatric illness (as non-pecuniary loss)[128], this loss shall be compensated but mere fear in itself has not yet been accepted as a compensable loss in the practice of the Hungarian Supreme Court.

4/80 The Supreme Court seems to require proven detriment arising from the wrongful interference with the inherent rights of the person in order to award compensation for non-pecuniary loss. As, however, the apparent reasoning behind this approach seems to be to exclude claims for compensating »bagatelle« harm, the importance of this conflict between theory and practice is not clear[129]. There were arguments in the course of the preparatory works of the Civil Code 2013 to formulate a provision that excludes awarding the indemnity replacing non-pecuniary damages for *de minimis* claims but this did not happen. In spite of this it seems that courts are reluctant to award non-pecuniary damages if the immaterial loss does not reach a minimum level or the interference with the inherent rights of the victim was insignificant.

4/81 In Hungarian court practice and theory it has never been questioned that separate legal entities (including companies) may have inherent rights which can be interfered with and thus they may be entitled to receive non-pecuniary damages[130]. Legal entities are supposed to own rights that are not capable of belonging only to natural persons by virtue of their nature.

4/82 Awarding damages for violation of values that cannot be expressed in money due to their non-transferable nature certainly implies the consequence that the law makes measurable in money what should not be measured with it. This was one of the reasons why, in the course of codification of the Civil Code 1959, the

125 *Lábady,* A nem vagyoni kártérítés újabb bírói gyakorlata 31, and *Petrik,* Kártérítési jog (2002) 74.
126 As the decision of the Supreme Court refers to the decision of the Court of 2nd instance in Legf. Bír. Pfv. III. 20.911/2007 sz. EBH 2007 no 1691.
127 Supreme Court, Legf. Bír. Pfv. III. 21.543/2007 sz. BH 2008 no 211.
128 Supreme Court, Legf. Bír. Pfv. III. 21.334/2007 sz. EBH 2007 no 1694; Supreme Court, Legf. Bír. Pfv. III. 21.147/2005 sz. BH 2007 no 6.
129 The Supreme Court rejected the claim for compensating non-pecuniary loss on the basis that the victim was ill for two weeks but recovered without any further complications. Supreme Court, Legf. Bír. Pfv. III. 24.313/1998 sz. BH 2001 no 12.
130 Supreme Court, Legf. Bír. Pfv. IV. 21.127/1999 sz. BH 2001 no 110.

awarding of non-pecuniary damages was rejected. This tendency, however, seems to be an inherent necessity. If the law rejected awarding non-pecuniary damages as a consequence of interference with personality rights, the level of protection of these rights would certainly fall to a lower degree (criminal law cannot provide proper protection against all members of society or players in the market, especially legal entities) which is a socially unacceptable result. Unless the law prevents persons from agreeing with others not to invoke the protection of their inherent rights, such a quantification in monetary terms is unavoidable[131]. It seems a necessary development in law that the protection of rights and legal interests results in commercialisation.

4/83 Distinguishing between pecuniary and non-pecuniary damages seems to be difficult in cases where both pecuniary loss and interference with personality rights occurred. Before introducing non-pecuniary damages into the Hungarian Civil Code in 1977, it was thought that the occurrence of non-pecuniary loss should always be linked with or implied in pecuniary damage. Thus, courts should award compensation for non-pecuniary losses as a part of general damages.

4/84 The concept of damage implies social evaluations and moral principles. It also may be a question of legitimacy if the courts or the legislator is the one determining compensable losses. Whether giving birth to a child may be the ground for a claim for damages is one of the most sensitive issues in the field of tort law. If a child with a cognitive disability was born because the doctors negligently failed to provide correct information on the foetus' condition and thus prevented the parents from deciding against giving life to the child, *the parents* are entitled to pecuniary as well as non-pecuniary damages (wrongful birth). This is a well-established practice of the Hungarian Supreme Court as well as being in line with the trends of European jurisdictions[132]. There is, however, a strong line of arguments in legal theory expressing a firm basic moral evaluation for rejecting claims on the ground of childbirth[133]. As far as *wrongful life* cases are concerned, the Hungarian Supreme Court established that a *child* shall not be entitled to claim either pecuniary or non-pecuniary damages from the medical service provider for being born with genetic or teratological deviations on the ground that, during the pregnancy, his/her mother could not have decided for an abortion because of the incorrect information given by the medical service provider if an abortion would have been otherwise permitted in such a case. The unificatory solution is to be restricted to wrongful life cases, ie to cases where the genetic or teratological deviation is of a

131 Tendency toward accepting right of publicity in US law.

132 Supreme Court, Legf. Bír. Pfv. III. 22.193/2004 sz. EBH 2005 no 1206 and BH 2005 no 394. Supreme Court, Legf. Bír. Pf. III. 24.931/2002 sz. BH 2005 no 18.

133 *Z. Navratyil,* Keresztülhúzott családtervezés: a gyermek, mint kár, Jogtudományi Közlöny 64 (2009) no 7-8, 321.

natural origin and developed independently of the activity of the medical service provider or its employees. Thus, claims for damages as compensation for prenatal injuries (compensation for injury suffered as a result of the intervention of doctors during the pregnancy) are not covered by the resolution. The solution precludes a claim bring brought by the child for wrongful life but does not affect the claims of parents. The demand for the passing of such a solution concerning damages for wrongful life arose because, although the Supreme Court followed a settled practice of accepting such claims[134], this interpretation did not correspond with the practice of some of the high courts in Hungary, which also declared and published their interpretation rejecting such claims brought by the child[135]. Not only the tension created by diverging practices of high courts but also the obvious deviation from the trends presented by European legal systems[136] led the Supreme Court to revise its practice in such cases. As a result, obviously influenced by court practice of other European jurisdictions and with the clear intention of harmonising Hungarian court practice with the trend toward rejecting such claims in most European jurisdictions, the Supreme Court decided to revise its former practice and to adopt a uniform practice of rejecting claims for damages for wrongful life. The decision was also supported by arguments referring to decisions of the European Court of Human Rights as well as to constitutional aspects. The result of passing such a decision in Hungarian law is a laying down of the law covered by the decision with the effect of an authoritative interpretation which might, perhaps should, have been given by the legislator too. The necessity for passing such a decision in Hungarian law supports the argument that such sensitive issues may and should be addressed by the legislator even if this does not seem to be compatible with the flexible system of tort law. The process of making law, in a democratic society, designed to channel and harmonise different social values and interests – in such sensitive areas – seems to be a more appropriate and more legitimate way of fixing such principles than court decisions.

4/85 The concept of compensable damage has not been elaborated in Hungarian legal theory and courts do not apply or refer to different categories or concepts of damage. Consequential loss was a distinct category in former private law before World War II. The distinction between actual harm and consequential loss including lost profit in that system was an important factor for limitation of liability. The tortfeasor was held liable for consequential loss and lost profit only if he had acted

134 Supreme Court, Legf. Bír. Pfv. III. 22.193/2004 sz. EBH 2005 no 1206.

135 Opinion of the Civil Law College to the Regional Court of Pécs no 1/2006 (VI. 2.). Opinion of the Csongrád County Court, referred to in the Explanatory Notes to the Unificatory Decision of the Supreme Court.

136 Explicitly referred to in the Explanatory Notes to the Unificatory Resolution of the Supreme Court.

intentionally or he was grossly negligent. The relevance of this distinction, however, was abandoned in the Civil Code 1959 which did not retain these categories.

4/86 There is a distinction between direct and indirect damage in Hungarian tort law literature that covers a problem of causation[137]. Secondary categorisations such as real damage and nominal damage, concrete and abstract, natural and normative or subjective and objective damage[138] are not used in Hungarian tort law, either in court practice or in professional discussions. Such approaches, however, may be relevant to professional methods applied by judicial experts appointed by the courts in order to establish damage, which is basically held to be a specific professional issue to be established by experts much more than a question of law to be decided by the courts, except for the problem of compensability which is a question of law, eg in the case of loss in illicit gains. In contract law a distinction between primary and consequential damage with vague conceptual contours[139] has been applied in the context of remedies for defective performance but this approach has not been extended to tort law. The distinction between performance interest and reliance interests or positive and negative interests[140] is also used in Hungarian tort law. Its development in Hungarian private law theory was also attached to consequences of invalid contracts and very much influenced by the German doctrine[141]. Today neither the real – contractual or delictual – nature nor the content of these categories are clear. In practice, the distinction between reliance and performance interests seems to be dissolved in the categories of actual profit and lost pecuniary advantage[142].

II. Causation

4/87 The consequence of establishing a causal link between compensable loss and wrongful conduct is liability. This necessarily involves causation being a legal concept. Causation is a central element of liability. In spite of this, in Hungarian legal theory and court practice, causation is not one of the widely addressed problems. German legal literature always had a great impact on Hungarian legal thought and this might have been an important factor in the theory traditionally focusing on legal rather than natural causation and attempting to find a general model, de-

137 *Gy. Eörsi,* A közvetett károk határai (1981); *A. Fuglinszky/A. Menyhárd,* Felelősség »közvetett« károkozásért, Magyar Jog 2003, 283.
138 *A. Fuglinszky,* Mangelfolgeschäden im deutschen und ungarischen Recht (2007) 118 ff.
139 *Fuglinszky,* Mangelfolgeschäden 162 ff.
140 *Gy. Eörsi,* A polgári jogi kártérítési felelősség kézikönyve (1966) 75.
141 *L. Asztalos,* A polgári jogi szankció (1966) 229.
142 Supreme Court, Legf. Bír. Gfv. IX. 30.030/2005 EBH 2005 no 1220, BH 2005 no 364.

scription or theory to describe causation[143]. These attempts did not produce useful results. The main ground for the failure of these attempts could be that they tried to adapt the philosophical concept of causation into a legal context and interpretation[144]. In socialist legal theory, the preventive function of liability came to the foreground of legal theory. The role of causation in risk allocation was also put into the context of prevention. The primary test of causation became whether the law could have a preventive impact on decisions of persons contributing to the causal link that resulted in damage.

4/88 There was no rule in the Civil Code 1959 which could provide any normative prescription or framework for causation. The Civil Code 2013 does not provide detailed regulation on causation either but provides two norms for assessing causation. In the context of multiple tortfeasors, the Civil Code 2013 provides that the provisions covering liability of multiple tortfeasors shall be applied accordingly if the damage might have been caused by any of several courses of conduct engaged in at the same time or if it cannot be established which conduct caused the damage[145]. This rule is a normative implementation of the solution to the problem of alternative causation concerning natural causation. The other relevant rule addresses legal causation providing a foreseeability limit in tort law and provides that the causal link shall not be established in connection with losses which were not and could not have been foreseen by the tortfeasor[146].

4/89 Even in former private law, before World War II, causation in tort law was regarded as a complex problem, which could be considered only in the context of the other preconditions of liability: accountability and damage. *Marton* described causation as a logical connection between the harm and the cause. He criticised the traditional approach, which restricts the causation problem to the question of whether the conduct is a precondition for establishing liability and which tries to cover the imperfections of the traditional culpability doctrine with the modifications of the causation link through picking out relevant causes from the complex texture of natural causation[147]. He argued that there is no difference between legal and natural causation. According to *Marton,* legal causation is identical to natural causation and the concept (or doctrine) of liability should provide the answer to the question as to which point we should go back to in the causation link in order to establish liability[148]. *Eörsi* also considers causation in the context of wrongfulness and accountability, the two further elements of liability. According to *Eörsi,*

143 *J. Szalma,* Okozatosság és polgári jogi felelősség (2000) 9 ff.
144 *H.L.A. Hart/T. Honoré,* Causation in the Law (1985) 9 ff.
145 Civil Code 2013, § 6:524 (4).
146 Civil Code 2013, § 6:521.
147 *Marton,* Kártérítés, in: K. Szladits Károly (ed), Magyar Magánjog III. (1941) 358 ff, 362, 365.
148 *Marton* in: Szladits Károly (ed), Magyar Magánjog III. 370 and *Marton,* A polgári jogi felelősség (1993) 168.

except in cases where the conduct itself is wrongful without taking regard of its result, causation is involved in every composite element of liability, but causation itself is not an independent precondition for liability. Causation cannot be considered in its abstract form, it can only be considered in respect of the policy according to which liability is established[149].

4/90 Causation is an element of the »flexible system« in tort law. It means that the court has to apply an evaluation method to choose the relevant cause(s) from the causal chain. The causal link must be established between the breach of duty (not to cause harm) and damage. It is not enough to consider the objective chain of events leading to the harm *(conditio sine qua non)* – the judge has to look for the relevant cause of the harm. It is a kind of adequate causality theory[150].

4/91 According to *Petrik,* the causal link between the harm and the tortfeasor's conduct is to be established if three concurrent preconditions are met: the harm could not have occurred without the tortfeasor's conduct; the conduct is attributable to the tortfeasor; and it is possible to influence the tortfeasor's conduct with the application of a legal sanction (the legal sanction may have a preventive effect)[151]. This approach is based on *Eörsi's* theory and presents a strong connection between wrongfulness and causation. According to this view, if the law did not have a preventive effect on behaviour, it is not reasonable to look at whether such behaviour was a relevant cause of the loss. The question of wrongfulness, ie the search as to whether the conduct complied with the required standard of conduct, emerges only if establishing liability could influence the behaviour of similar persons in the same situation. This approach does not draw a clear line between wrongfulness and causation.

4/92 Theory does not analyse the relationship between natural and legal causation but addresses causation as an element of liability. The but-for test, requiring that, in order to establish liability, the harm could not have occurred without the tortfeasor's conduct, is a generally accepted starting point in establishing the causal link in both theory and practice. Neither do courts seem to attach great importance or relevance to the distinction between natural and legal causation, although it is also known in Hungarian legal literature[152].

4/93 Neither regulation nor practice distinguishes between direct and indirect causation and it is well established in theory and practice that an omission can be regarded as the cause of harm. A breach of duty is treated as a cause of the damage if the harm would not have occurred in the case of performance of the legal obligation. The wrongdoer will be liable for his omission if the damage would not have

149 *Gy. Eörsi,* A jogi felelősség alapproblémái – a polgári jogi felelősség (1961) 472.
150 *Eörsi,* A polgári jogi kártérítési felelősség kézikönyve 263.
151 *Petrik,* A kártérítési jog (2002) 27.
152 *A. Dósa,* Az orvos kártérítési felelőssége (2004) 97.

occurred if he had acted according to his duty, as imposed on him by law[153]. In the case of an omission, liability is established by not starting a causal process which would have prevented the harm. If the breach of the duty is not a natural cause of the harm, the causal link is not to be established. If, for instance, a doctor is called or arrives too late to a seriously injured person but it is proven that the injured person would also have died if the doctor had been present earlier, the omission is not a cause of the harm, so liability cannot be established on the basis of a breach of duty[154]. The same holds for cases where a physician omits his duty to inform the patient about the possible risks and side effects of medical treatment or intervention. If the patient would have consented even if he had been correctly informed and would not have decided otherwise, the court will reject the claim for damages for breaching the duty to inform on the ground of lack of causation[155]. The omission can also be a relevant cause of the harm if there is a legal duty to act, the tortfeasor breaches this requirement by not acting and, if in the case of acting, that harm would not have occurred. In this case all of these requirements are fulfilled.

4/94 The Civil Code 1959 provided a special rule for damage caused by *multiple tortfeasors.* According to Civil Code 1959, § 344, if the damage was caused jointly by two or more persons, their liability vis-à-vis the victim was joint and several. Their liability towards one another was divided in proportion to their respective degree of responsibility. Liability for damages was divided in equal proportions among the responsible persons if the degree of their responsibility could not be established. The court was entitled to declare joint and several liability and hold the persons having caused the damage liable in proportion to their respective contributions if doing so would not jeopardise or considerably delay the compensation of the damage or if the aggrieved person had himself contributed to the occurrence of the damage or had procrastinated in enforcing his claim without any excusable reason[156]. In the literature and in practice there is controversy about

153 Official Explanatory Notes for the Civil Code 1959, § 339.

154 *Petrik,* A kártérítési jog 27.

155 *Dósa,* Az orvos kártérítési felelőssége 99.

156 The Civil Code 2013, § 6:524, maintains the same system. If two or more persons caused damage jointly, they are jointly and severally liable. The court shall be entitled to exempt the tortfeasors from joint and several liability if the injured party contributed to the occurrence of the damage or this is reasonable under special and equitable circumstances. If the court refrains from holding the tortfeasors jointly and severally liable, the court shall declare their liability in proportion to the extent of their wrongful conduct or if the former cannot be determined in proportion to the extent of their contribution. If the proportion of contribution cannot be established, the damage shall be compensated by each tortfeasor in equal proportions. Damage shall be borne by the tortfeasors proportionally according to their wrongful conduct; if the proportion of wrongful conduct cannot be established, damage shall be borne by the tortfeasors in proportion to the extent of their contribution. If even the proportion of contribution cannot be established, damage shall be borne by each tortfeasor in equal proportions. The provisions of multiple tortfeasors shall be applied if the damage might have been caused by

whether two or more persons should act with a certain degree of common intention or whether they can act independently to be held jointly and severally liable for the damage. In the literature there are opinions according to which common intent is a necessary requirement for establishing joint and several liability[157]. This view is, however, not in accordance with the policy underlying the Civil Code 2013 which explicitly states that common intention of several tortfeasors is not a precondition for treating them as joint or multiple tortfeasors. More authentic interpretations also stress the objective character of the assessment and that common intent is not a precondition for joint liability; the object of the tortfeasors' conduct is irrelevant. If, for instance, two cars collide and as a result of the accident someone who is sitting in one of the cars is injured, the two car drivers shall be treated as multiple tortfeasors and are jointly and severally liable[158]. Mere interdependence in causation is, however, not always enough to establish joint liability. If someone negligently fails to fulfil his obligation and this makes it possible for someone else to cause harm, he/she shall also be jointly and severally liable with the tortfeasor who caused the harm directly. The two main principles for rendering joint and several liability are prevention and the provision of a better chance of compensation for the claimant. The distinction between – jointly and severally liable – multiple tortfeasors and several independently liable tortfeasors can be found in terms of causation: the tortfeasors are jointly and severally liable multiple tortfeasors if the behaviour of each is a *conditio sine qua non* but the tortfeasors shall not be jointly and severally liable if there is no causal interdependence between the harmful conduct or if the interdependency is too remote. If, for instance, someone causes a car accident and the injured person suffers an injury which is not fatal but dies because the surgeon is negligent, the two tortfeasors are not jointly and severally liable[159]. Thus, joint and several liability is to be established if each of the tortfeasors' conduct was a conditio sine qua non for the whole and same loss. This statement is to be amended to the effect that joint and several liability is also to be established if the damage might have been caused by any one of the several courses of conduct engaged in at the same time, or if it cannot be established, which conduct caused the damage[160]. This means that, in the context of multiple tortfeasor scenarios, the contribution to creating the risk can result in establishing the causal link. As far as multiple tortfeasor scenarios and establishing joint and several liability are concerned, tort law focuses on causa-

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any one of the several courses of conduct engaged in at the same time, or it cannot be established, which conduct caused the damage.

157 *B. Kemenes/L. Besenyei,* A kártérítés általános szabályai, in: G. Gellért (ed), A Polgári Törvénykönyv Magyarázata (2002) 110 ff, 1120.

158 *Benedek/Világhy,* A Polgári Törvénykönyv a gyakorlatban (1965) 349.

159 Official Explanatory Notes for the Civil Code 1959. Notes to § 344.

160 Civil Code 2013, § 6:524 (4).

tion, where the damage integrates the chain of events and conduct contributing to the loss into a »common« causal link and not on the intention of the tortfeasors. Whether the tortfeasors actually influenced each others' conscious, intent or behaviour is not relevant. If, for example, several persons agree to embark on a crime and one of them argues that the others would have committed it even if he had not joined them, this plea is not considered even if it were actually true. That is why psychological causation is not considered in such cases at all[161]. It is also irrelevant whether the tortfeasors knew about the acts of each other. Common causation can also be established if the bases of liability are different. For example, if someone causes an accident by driving a car because he was negligent in complying with the rules of traffic, the owner of the car as the operator of the car is liable under the strict regime of liability for extra-hazardous activities[162], while the driver is liable according to the normal fault-based liability regime, but they will be held to be multiple tortfeasors being joint and severally liable vis-à-vis the victims of the accident.

4/95 In the course of establishing that the defendant contributed to the causal link resulting in the loss, the burden of proof of the causal link between the defendant's conduct and the injury suffered rests on the victim. If the victim could have been hurt either by a person's actions or by a hazard and the claimant cannot prove that the person caused the victim's injury or death, his claim shall be rejected. The courts in certain cases may solve the problem by establishing joint and several liability, but only where the danger was an indirect cause of the injury or death, ie the but-for test can be satisfied relating to the danger. The burden of proof is regarded very strictly by Hungarian courts. If the cause of the harm is unknown, the claimant cannot establish liability of the defendant on the ground of general rules of liability. For this reason this problem is neither addressed in the literature nor arises in court practice. If it is proven that a certain physical or psychological condition of the victim determined his injury but a certain event worsened this condition and therefore accelerated the occurrence of damage, the liability for this event can be established[163].

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161 In a case where three persons stole a car, one of them was taken home, then the other two thieves drove further and after a while suffered an accident in which the car was damaged, the liability of the person who was at home was established also for the damage suffered in the accident. It was completely irrelevant in the case if he was actually there or had any influence on the decisions, intent or behaviour of the driver. Supreme Court, P. törv. V. 20 883/1979 sz. BH 1980 no 471.

162 Civil Code 1959, § 345 (1). The operator of an extra-hazardous activity shall be obliged to compensate loss resulting from it. He shall be relieved of liability by proving that the loss was due to an unavoidable cause that fell outside the scope of the activity. Civil Code 2013, § 6:535 (1). The operator of an extra-hazardous activity shall be obliged to compensate loss resulting from it. He shall be relieved of liability by proving that the loss was due to an unavoidable cause that fell outside the scope of his activity.

163 Supreme Court, Legf. Bír. Pfv. IV. 21.910/2001 sz. EBH 2002 no 626.

4/96 According to theory and practice, the multiplicity of tortfeasors shall be established also by successive events: the thief and receiver of stolen goods are multiple or common tortfeasors and are jointly and severally liable even if they did not act together and the receiver was not an accessory to the theft[164]. From the structure of thinking regarding common causation and multiple tortfeasors, it follows that the plea of the receiver that the thief would have given the stolen goods to another if he had not taken them would not be accepted even if this was actually the case. *Eörsi* tries to explain the multiplicity of tortfeasors with the following example. D causes an injury to P who needs hospital treatment because of the injury. If P dies in the hospital, the direct cause of his death will determine whether D shall be proportionally or jointly and severally liable with the hospital. If P dies as a result of a fire which broke out in the hospital, the two causes (injury and fire) are independent, so there is no common causation and D and the hospital are not multiple tortfeasors: both of them shall be liable for the harm they respectively caused. If P dies in the hospital as a result of malpractice in the course of hospital treatment, D and the hospital are multiple tortfeasors and jointly and severally liable because the accident is a relevant cause of the death of the victim. If P dies in the hospital as a result of an infection in the hospital or in the city, the multiplicity depends on whether the injury increased the chance of being infected. If the answer is yes (eg because the injury weakened P's immune system), then D and the hospital are multiple tortfeasors and jointly and severally liable[165].

4/97 There are cases where it can be established that the defendant took part in a chain of events resulting in damage but it is impossible to ascertain whether the loss could also have occurred in the absence of his conduct. In such cases, as the burden of proof is allocated to the victim, the impossibility of proving who caused the harm and the damage would result in no compensation. This need for proof or *Beweisnotstand* would have left the damage uncompensated in cases where the damage and fault are obvious and the narrow circle of possible tortfeasors is known. The principle of prevention could also be undermined by rejecting the claim in these cases. On the other hand, relieving the victim of the burden of proving the causal link in such cases could not only undermine the structure of tort law but it also involves the risk of declaring someone liable without legal ground, thus leading to unjust results.

4/98 Courts, trying to adhere to the structure and the conceptual framework of tort law, have found different solutions to this problem. The first is that they establish partial causation if the defendant contributed to the plaintiff's damage but was not the sole cause of the loss. It has been established that in such cases the defendant cannot be held liable for the whole damage as there were other con-

164 Supreme Court, Legf. Bír. Pfv. III. 21.290/2001 sz. BH 2004/135 sz.
165 *Eörsi,* A polgári jogi kártérítési felelősség kézikönyve 332.

tributing causes resulting in the victim's losses. The defendant cannot be held liable for the part caused by external factors (like weather, natural forces, etc) or by other tortfeasors. Thus, the tortfeasor shall be liable (only) according to the ratio he contributed to the causal link resulting in the relevant compensable loss. Although the courts consequently avoid considering or even speaking of probability, this doctrine, in its result, seems to imply that in certain cases increasing the probability of occurrence of damage may establish a causal link as a contributing cause and the liability of the tortfeasor will be limited to the ratio he contributed to the loss[166]. The argumentation of the courts refers to partial causation but the decisions may actually imply divisibility of damage. The divisibility of damage is not considered in the available judgments in this context but can be seen as a precondition for establishing liability for only part of the loss.

4/99 The second is that they apply rules governing the liability of multiple tortfeasors. If it can be established that the defendant participated in an activity resulting in damage, his liability can be established as liability of one of the multiple tortfeasors. In such cases the court does not address the issue of whether the defendant's conduct was a conditio sine qua non for the incurred loss insofar as it is irrelevant whether it was the defendant who actually performed the damaging conduct or if the other tortfeasors (one of them performed the actual damaging conduct) would have participated in the activity if the defendant had not done so. Courts presumably try to solve the problem of when there were more persons involved in the conduct resulting in damage but only one or some of them could be the actual tortfeasor(s) and the victim does not have enough information to identify such, so that, due to the burden of proof shifting to her, the result is a rejection of the claim. The logical basis for this approach may be that the risk was created by several persons, among them the defendant. This approach shifts establishing the causal link between the conduct and damage to a causal link between creating a risk and the occurrence of damage. The procedural logic behind this is that multiple tortfeasors are jointly and severally liable for the whole of the damage but it is not necessary for all of them to be involved in the civil procedure. Thus, if only one of the tortfeasors who takes part in the activity creating the risk resulting in the loss or contributing to the chain of events making the emergence of loss possible is party to the procedure as a defendant, the liability of this person can be established for the whole damage. The fact that the loss may actually have been caused by one or more other multiple tortfeasors who are not necessarily the defendant is irrelevant. This is important only concerning the issue of distributing the liability between the tortfeasors but not in establishing the defendant's liability towards the victim[167]. These solutions would open the way for accepting

166 Supreme Court, Legf. Bír Pfv. VIII. 20.831/2009 sz. BH 2010 no 64.

167 Supreme Court, Legf. Bír. Pf. VI. 21. 525/1993 sz. BH 1995 no 214; Supreme Court, P. törv. V.

a new concept of causation, although in a limited way. According to this concept, increasing the probability of occurrence of loss could establish a (natural) causal link. Such an approach, also suggested in the literature of economic analysis of law, could provide an appropriate solution for the deficiencies of the but-for test (which also prevails in Hungarian tort law) and a correct basis for establishing market share liability, causation in the »hunter« scenario or establishing liability if the conduct increased the probability of occurrence of damage but it is impossible to know if the victim suffered the damage due to this increased risk or would also have suffered it otherwise[168]. Such a new approach to causation could solve the problems that theory and practice have to face concerning natural causation but neither in theory nor in practice has such a new concept been described. Argumentations of the courts in judgments are, in general, not clear in this respect. There is a kind of flexibility which is discernible and which shows that courts do not insist on following the conditio sine qua non principle if they realise that this would result in rejecting a legitimate claim against a defendant who contributed to creating the chance of occurrence of loss although such might not have contributed to the occurrence of loss.

4/100 There is a new tendency in court practice toward reversing the burden of proof concerning the causal link. Courts in Hungary seem to find that in some cases a rigid application of the but-for test and the rule concerning the burden of proof regarding the causal link may result in a socially unjust and, as such, improper risk allocation and they try to find ways to correct this result, especially in cases of information asymmetry where the victim, due to his position, cannot provide the necessary information in order to give evidence while the risk of absence of information can reasonably be shifted to the defendant. The typical field where this development is to be seen is provided by medical malpractice. In the past few years, a clear tendency can be identified towards shifting the risk of uncertainty in causation to medical health care providers in medical malpractice cases. In this group of cases, the courts seem to accept that the burden of proof resting on the victim concerning a causal link is discharged even if there are unclear, unrevealed facts of the case such as the unknown origin of injuries or illnesses. In some cases courts reverse the burden of proof of the causal link by requiring the proof of an absence of a causal link from the defendant medical service provider in a matter where the defendant's doctors failed to comply with the required duty of care in the context of unclear facts of the case[169]. This tendency to shift the risk of uncer-

20.883/1979 sz. BH 1980 no 471; Supreme Court, Legf. Bír. Pfv. III. 21.290/2001 sz. BH 2004 no 135.

168 For example, if due to the toxic emission of a plant, the number of persons living in the area suffering injury to health increases by a certain percentage but it is impossible to establish if the victim belongs to the group which would have suffered health damage even in the absence of the emission or got it only because of it.

169 Supreme Court, Legf. Bír. Pfv. III. 21.598/2008 sz. EBH 2009 no 1956.

tain causation to the medical service provider or other potential tortfeasor seems to be clear in personal injury or medical malpractice cases but still has not been confirmed as a general rule. Although at the level of arguments this is expressed so as to accept that changes in chances may establish a causal link and increasing the risk of occurrence of damage can establish a causal link and the liability of medical health care service providers, the doctrine of loss of chance has not been recognised in Hungarian tort law, either as a head of compensable loss or as being sufficient to establish a causal link. As a result of a recent development in the context of liability for medical malpractice and liability for non-pecuniary damage, court practice seems to accept that increasing the risk of loss may establish liability. In a decision reported in 2006, the Supreme Court established the liability of doctors on the basis of an error in a diagnosis that resulted in an increased risk of giving birth to children with cognitive disabilities and awarded pecuniary and non-pecuniary damages to the children and their parents[170]. This tendency was confirmed in another decision of the Supreme Court[171] awarding damages on the basis that the doctors, in the course of treatment of a newborn child, failed to reduce the risk of meningitis and its consequences, although they should have recognised the risk to which the child was exposed[172]. In a recent judgment[173] the Supreme Court clearly formulated that losing a chance of recovery may establish a causal link between the death of the patient and the loss of the plaintiff. Although such cases have been presented and reported as loss of a chance cases, neither inherent uncertainties were involved nor were probabilities considered. What the courts actually did was establish a reversed burden of proof of causation on the basis of the negligence of the defendant's doctors. In the judgments the courts allocated the risk of uncertainty and assigned it to the defendant. Such reversal of the burden of proof has occurred in other cases as well. In a recent judgment concerning the liability of a motorway operator[174], the Supreme Court required the operator to prove either that the fence was not defective at the time of the accident at all or that game could not get onto the highway due to a defect of the fence in order to be relieved of liability for damage that was caused by game gaining access to the road.

4/101 These tendencies, however, have not yet been extended to cases other than personal injury and medical malpractice. The doctrine of loss of a chance has not been recognised as a prevailing doctrine. Probabilities are not calculated in such cases and in other fields of professional liability (eg liability of lawyers) courts

170 Supreme Court, Legf. Bír. Pfv. III. 20.028/2006 sz. BH 2006 no 360.
171 Supreme Court, Legf. Bír. III. 21.191/2007 sz. BH 2008 no 184.
172 *Jójárt Eszter,* Az esély elvesztése, mint kár? Jogtudományi Közlöny 64 (2009) no 12, 518.
173 Supreme Court, Legf. Bír. Pfv. III. 22.188/2010 sz. BH 2012 no 10.
174 Supreme Court, Legf. Bír. Pfv. III. 21.682/2008 sz. BH 2010 no 7.

are reluctant to accept such an approach. It may also be an important limitation of this new development that, in cases where courts accepted the reduced chance of recovery as a causal link, non-pecuniary damages have been awarded. Thus, courts did not have to face the problem of calculating damage or partial compensation and, on the other hand, the highest protected interest was interfered with. There are no indications that such approaches will be extended to claims where rights or interests protected on a lower level are involved or to claims for pecuniary damages.

4/102 It seems that court practice does not attempt to solve the problems of natural causation on doctrinal bases (loss of a chance, market share liability) but tries to work out solutions such as shifting the burden of proof, establishing partial causation, and accepting changes of probability as a causal link in the context of non-pecuniary damages in medical malpractice cases.

4/103 Causation has been addressed in legal theory much more as an element of limiting liability than as of establishing liability. More focus has been placed on under what circumstances liability should not be established in spite of the fact that the but-for test is complied with rather than how causation works in the context of tort law as a body of law attempting to provide an optimal level of prevention and a balance between deterrence and self-reliance.

Part 6 The elements of liability

I. Wrongfulness

4/104 In Hungarian tort law, unlawfulness is a concept which is deemed a structurally and theoretically independent element of liability distinct from fault. As a general principle in Hungarian legal theory, conduct which results in damage to others is unlawful and from this it follows that causing harm is always unlawful[175]. The theoretical basis for the concept of unlawfulness is that causing damage shall be deemed unlawful unless it is explicitly otherwise provided by law. If the tortfeasor can prove that, in the particular case, causing harm was explicitly provided to be lawful by law, he shall not be liable[176]. The basic idea behind this approach was that if the generally accepted requirements of social behaviour were violated, it should not be necessary to find a specific norm the tortfeasor failed to comply with in order to establish liability for behaviour that resulted in loss to others or to establish that legally protected interests were interfered with. Court practice, however, has never been consistent in following this approach. Courts very often try to find a certain legal norm which has been infringed by the tortfeasor in order to establish liability even if this would not be a necessary requirement. This approach of the courts has often been criticised as being incorrect and inconsistent with the underlying concept of unlawfulness. On the other hand, the current theory oversimplifies the original idea which implicitly requires behaviour which does not comply with generally accepted values in society. This original idea never meant that causing damage was unlawful per se. Unlawfulness as a necessary precondition of liability should be treated as a complex category such as fault or causation. Court practice, which already does so[177], is not incorrect but is evidence of the untenability of the original over-simplifying theory. This complex approach of keeping the concept of unlawfulness as flexible as fault and causation would fit the flexible system of tort law and would allow the courts greater discretion in risk allocation and risk spreading. It has become clear that the original theoretical concept of unlawfulness mentioned above should be revised.

175 Whosoever unlawfully causes damage to another person shall be liable for such damage. He shall be relieved of liability if he proves that his act was not wrongful. Civil Code 2013, § 6:519.

176 *Eörsi,* A polgári jogi kártérítési felelősség kézikönyve no 221. The defences are, for example, the consent of the aggrieved person, necessity, the authorised exercise of rights, etc.

177 Pécs High Court of Justice, Pécsi Ítélőtábla Pf. III. 20.356/2004 sz. BH 2005 no 17.

4/105 The Hungarian legislator, however, failed to consider that not only are unlawfulness and fault interrelating and overlapping elements of liability but that holding them separate is also burdened by a contradiction: if behaviour was unlawful, why should it not be sanctioned due to absence of fault and vice versa? How is it possible that behaviour which does not comply with the required standard of conduct may be held lawful? Instead of reconsidering unlawfulness and fault and attempting to provide a proper concept involving both of them (wrongfulness), the legislator in the Civil Code 2013 reinforced the independent nature of the concept of unlawfulness, and provided a specified test for it which may eliminate the structural contradiction in the system. According to this rule, all wrongdoing resulting in damage shall be deemed unlawful, except if: a) it was caused with the victim's consent; b) it was caused to an aggressor in the course of warding off an unlawful attack or the threat of an imminent unlawful attack insofar as such conduct did not exceed what was necessary to ward off the attack; c) it was caused in necessity, insofar as it was proportionate; or d) it was conduct permitted by the law and the conduct did not interfere with legally protected interests of another person or the law otherwise provides for paying compensation to the aggrieved person[178].

4/106 Thus, within this structure it shall be questioned first whether the behaviour resulting in damage was lawful or not. If the law does not provide that causing damage under the given facts of the case is lawful, it is to be deemed unlawful. If that is the case, it shall be questioned whether the tortfeasor's act complied with the required standard of conduct (the absence of which establishes fault) or if there are other circumstances relieving him of liability. If so, he shall be exonerated from liability. This is a general test of unlawfulness. It seems that, in the context of unlawfulness, Hungarian tort law follows a result-based approach. This is strengthened by the concept of fault which is also considered an objective concept.

4/107 The sensitive issue of liability of persons taking part in a juridical procedure as a witness or expert has not been exposed so far in Hungarian tort law. It seems, however, that, in giving priority to the public interest attached to access to justice, courts provide some kind of immunity to such participants of juridical procedures. The practice of criminal courts explicitly establishes such immunity for parties and witnesses if they made statements in the course of a procedure that could otherwise be qualified as an interference with good reputation and human dignity[179]. Also, even in the absence of a doctrine such as »expert witness immunity«, courts are reluctant to accept claims for damages against judicial experts on the basis of their opinion provided in the court procedure[180]. In such cases courts

178 Civil Code 2013, § 6:520.
179 Supreme Court, Legf. Bír. Bfv. III. 326/2004 sz. EBH 2004 no 1011.
180 Pécs High Court of Justice, Pécsi Ítélőtábla Pf. III. 20.356/2004 sz. BH 2005 no 17.

do not hold the conduct of the defendant who made the statements or gave the opinion as a party, witness, expert or other participant to another procedure unlawful.

There is no form of *de minimis* rule accepted, either in theory or in practice, although, in the context of non-pecuniary damages, courts are reluctant to award non-pecuniary damages if there is no apparent violation of a legally protected interest. **4/108**

The required duty of care is set by a general clause as a general requirement, in the sense of a standard of conduct that persons are required to follow in the course of exercising their rights and performing their obligations in private law relationships. This rule is provided as an overall principle as part of the introductory provisions of the Civil Code 1959 as well as of the Civil Code 2013. The required duty of care is conduct that is generally expected under the given circumstances of the case[181]. As non-compliance with the required standard of conduct is defined by the same rule, this is an element of fault. Using the same rule as the basis of fault and unlawfulness, this element of liability breaks with the internal logic of making a distinction between unlawfulness and fault and creates internal inconsistency[182]. According to this type of regulation, the proper view would regard wrongfulness as a concept covering both unlawfulness and fault. There is no specific rule or doctrine, either on the level of legislation or in court practice or theory for omissions. Thus, if there was a duty to act under the given circumstances of the case, such shall also be assessed under this general clause. The underlying idea behind this is that in most cases it is impossible or senseless to make a distinction between act and omission, as mostly they can be described interchangeably (eg if a car driver drives too fast, it is an act – he exceeds the speed limit but, at the same time, an omission as he fails to comply with the statutory requirements on the maximum speed limit). The central question is always the compliance or non-compliance with the required standards of society. **4/109**

Although understanding the response of courts to claims covering the protection of pure economic interests lies at the heart of tort law, there is no specific doctrine in Hungary that covers pure economic loss. Pure economic loss as an independent category of damage or description of certain protected interests is not known in the Hungarian legal system. The main conceptual feature of pure economic loss is that it is a loss without antecedent harm to the plaintiff's person or property, which is not consequential loss in the same patrimony in which property has been damaged and which is not the loss of the plaintiff who, as a person, **4/110**

181 Civil Code 1959, § 4 (4); Civil Code 2013, § 1:4 (1).

182 As it is inconsistent that behaviour complying with the required duty of care can be unlawful in the context of liability or if conduct which is unlawful can still be in line with the required standard of conduct.

has been injured[183]. Pure economic loss is »harm not causally consequent upon an injury to the person (life, body, health, freedom or other rights to personality) or to property (tangible or intangible assets)«[184]. Hungarian case law is poor in this area of tort law. One reason for this is that for a long time the concept of economic loss itself had been incompatible with the socialist social and economic approach, which did not respect profit and the chance of gains. A further consideration relates to the fact that courts normally apply the flexible system of tort law without explicitly referring to it. The problem of pure economic loss is the problem of limitation of liability and mostly it is a problem of legal causation in case law and legal theory.

4/111 The Hungarian Supreme Court, in a case where a sales representative suffered a car accident which was caused negligently by another car driver and the concluding of the contract between the sales representative's employer and another party failed because the accident prevented the sales representative from coming to the place of contracting, held that the unrealised net income, which the employer would have earned from the performance of the contract if contracting had not been frustrated by the accident, is a compensable economic loss to the employer. The driver who caused the accident in which the sales representative was involved caused this economic loss. On this ground, the court held the driver liable for the economic loss of the employer and ordered the defendant (the insurer of the driver who caused the accident) to pay the lost net income as compensation to the plaintiff[185]. It is remarkable that the defendant in this case was the tortfeasor's liability insurer and there seems to be a tendency in court practice that courts are more willing to order compensation if the risk is shifted to an insurance company. There are no further decisions relating to other typical cases of pure economic loss (further cases of ricochet loss, transferred loss, closures of public markets, transportation corridors and public infrastructures or cases of reliance upon flawed data, advice or professional services) which could have reinforced the standpoint of the courts in this case. Due to the specific facts of this case and the absence of a general conceptual approach, it is impossible to predict whether this decision may be the starting point for a tendency in this direction or was just a one-off case.

4/112 It seems that a great bulk of the typical pure economic loss cases are treated in Hungarian tort law theory and practice as part of the problems of causation and they find their place under the heading »indirect losses or indirect causation«. The problems of indirect causation are coming into the foreground nowadays in pro-

183 *M. Bussani/V. Palmer* (eds), Pure Economic Loss in Europe (2003) 5.

184 *H. Koziol,* Compensation for Pure Economic Loss from a Continental Lawyer's Perspective, in: W. van Boom/H. Koziol/C.A. Witting (eds), Pure Economic Loss (2003) 141 ff.

185 Supreme Court, Legf. Bír. Pfv. VIII. 20.295/1999 sz. BH 2001 no 273.

fessional debates. The model case for this problem is that a company (as primary victim) suffers loss and – as the result of this loss – the value of the company's shares owned by the members of the company (as secondary victims) also falls. The question is whether the members of the company (the owners of the shares) may bring a successful action in tort against the tortfeasor, seeking compensation for the depreciation of their shares. The general and commonly shared view among legal practitioners (including lawyers and judges) and scholars is that such a claim by the members of the company should be dismissed and these kinds of losses should not be compensated although a clear theoretical answer to the question could hardly be found. It seems that in the flexible system of tort law, the solution to this problem is also to be found primarily in causation. The partial answer of the Supreme Court to this problem is that the claim of the company against the tortfeasor should be decided first in order to assess the loss of the shareholders. Enforcement of the claim of the company is a necessary precondition of the possibility of the claim of the shareholder. Insofar as the company did not enforce the claim or if the claim of the company was rejected, the shareholders cannot have an established claim either[186].

4/113 The basic rule of liability providing the concept of fault lies at the heart of Hungarian tort law regulation. According to this rule, if someone causes harm unlawfully to another person, the tortfeasor shall pay damages unless he proves that he acted as was generally expected under the given circumstances of the case. With the special standard of »generally expected behaviour under the given circumstances«, the Civil Code 1959 as well as the Civil Code 2013 have been enacted under the influence of the theory of fault-based liability with a special objectivised standard putting the basis of accountability somewhere between subjective and objective liability.

4/114 The burden of proof regarding damage and the causal link between the tortfeasor's conduct and damage as preconditions of liability is allocated to the plaintiff. The burden of proof as regards compliance with the generally required standard of conduct (»generally expected behaviour under the given circumstances«), ie absence of fault, is allocated to the tortfeasor. In Hungarian tort law, unlawfulness of behaviour is defined as causing damage. Thus, it is the measure of lawfulness of the behaviour which determines whether causing damage was permitted under the given circumstances or not. The unlawfulness of causing damage is presumed and also the tortfeasor has to prove that, in the given situation, causing damage was permitted by law in order to exempt himself from liability. The basic norm of liability provides the general rule and there are specific forms of liability for different situations, which make the divergence from the general rule necessary or

186 *Fuglinszky/Menyhárd,* Felelősség »közvetett« károkozásért, Magyar Jog 2003, 286. Supreme Court, Legf. Bír. Gfv. IX. 30.252/2005 sz. BH 2006 no 117.

where establishing liability is necessary but would not follow from the general norm. The basic idea behind this structure is twofold. First, there are cases where liability is imposed on a person who may not be the actual tortfeasor (he himself did not engage in conduct resulting in damage). Second, different measures or preconditions are to be applied for the person otherwise liable to be relieved of liability, ie fault is replaced with stricter prerequisites (eg unavoidable cause falling outside the scope of activity).

II. Fault

4/115 Although the concept of fault has traditionally been at the core of tort law (in contrast to damage) in Hungarian theory, emphasising the function of influencing the behaviour of members of society in order to prevent wrongdoing, there are no general guidelines or doctrines (eg as was suggested by the Hand-rule formulated by the American judge, *Learned Hand,* and supported in the economic analysis of law literature as well). As has been explained in tort law theory, if prevention is the primary function of tort law, only conduct that can be influenced by law may be relevant in the course of establishing liability. Thus, conduct that is attributable to the person whose liability is at stake can reasonably be held as establishing liability for damages. To define and to establish whether and under what preconditions or circumstances conduct can be attributable to the defendant is a question of putting the social evaluation of the conduct somewhere on a scale. The weakest point of the scale is subjective liability, where liability is established according to the content of the conscious state of the tortfeasor's mind (this is the point of view of criminal liability), while the strongest point is absolutely strict liability where there is no exoneration of the person whose liability is at stake.

4/116 An important peculiarity of Hungarian tort law is that it involves fault-based liability with a reversed burden of proof. This means that if the victim has proved the damage and the causal link between the damage and the unlawful behaviour of the tortfeasor, it is the tortfeasor who has to prove the absence of fault in order to be relieved of liability. In Hungarian tort law the basic norm requiring fault as a prerequisite for liability puts the valuation on the scale somewhere between the weakest and the strictest point. The conscious state of mind or the personal skills, knowledge, etc of the tortfeasor are, unlike in criminal liability, irrelevant from the point of view of establishing fault. The tortfeasor cannot be exempted from liability on the basis that he used all his best efforts in order to avoid (not to cause) the loss. He has to prove that his conduct complied with the required standard of conduct under the given circumstances of the case in order to be relieved of liability. The generally required conduct is an objectivised measure expressing what the de-

fendant should have done under the circumstances of the case. Thus, will, intention or other subjective criteria are not relevant in the course of establishing fault. Establishing fault involves an objective assessment of the defendant's conduct in the given situation in the light of social evaluation. Specific forms of liability, such as liability for extra-hazardous activities, liability for animals, vicarious liability, product liability, environmental liability, liability for nuclear damage, etc shift the assessment to the stricter end of the scale in different degrees by specifying the prerequisites for exoneration for the person on whom liability is to be imposed.

4/117 By definition tort law concerns liability for the violation of duties imposed on persons by law and not by contract. If an obligation is contractual, the sanction for violating it involves liability for breach of contract and not liability in tort. There is a strict and consistent division between delictual (in tort) and contractual liability, in the theory and structure of civil law. This, however, does not necessarily mean that such a distinction is reflected on the level of regulation too. Moreover, if one explains liability as a civil law sanction for violating a civil law obligation, keeping them together and providing common regulations for them seems to be a palpable approach. The question is, however, whether the difference arises from the contractual or non-contractual nature of the infringed obligation, ie whether the basis of liability is a violation of a voluntary promise or a legal norm (a general obligation to prevent harm or a general prohibition from causing harm to others in society), and whether the inevitable differences in the underlying policies justify and call for different regulations or not.

4/118 One obvious and significant difference between liability in tort and liability for breach of contract has, however, been clearly developed in court practice and this is the different measure for exculpation: in contractual cases courts apply stricter tests in assessing whether the tortfeasor acted as was generally expected in the given situation and allow exculpation only if the defendant can prove that the harm in the given circumstances was unavoidable. Thus, the level of the required standard of conduct in contractual liability is higher than that in tort cases[187]. This tendency, and the obvious difference between the relationship of the parties in contractual and non-contractual cases, involving the need for different limitation measures too (such as the foreseeability doctrine for liability for breach of contract), has led the Hungarian legislator to the conviction that the unified system should be replaced by a division between contractual and non-contractual liability, even if they would basically remain congruent with respect to the measure of damages. The regulation on calculation of damages and the means of compensation itself – apart from the foreseeability limit for damages for breach of contract – is the same for liability for torts and for breach of contract in the Civil Code 2013.

187 *Kemenes,* Polgári Törvénykönyv Polgári Jogi Kodifikáció 2001/1, no 9 ff.

4/119 As a result, while maintaining the concept of fault for liability in tort, the Civil Code 2013 has introduced – in line with the developments in court practice – a strict liability regime for liability for breach of contract. The contracting party shall be relieved of liability only by proving that the circumstances causing the breach of contract fell outside his control, were not foreseeable at the time of concluding the contract and he could not have been expected to avoid these circumstances or to prevent the loss[188]. This general rule in contractual liability was designed according to the needs of commercial transactions, especially for the sale of goods. Its application will presumably lead to many problems in long-term relationships, fiduciary relationships and in cases of professional liability such as the liability of doctors or lawyers. Court practice[189] today applies strict liability regimes for business contracts but not for the liability of doctors and lawyers, although they are also in contractual relationships with their clients. It is difficult to assess how the strict regime of contractual liability will work within these relationships and this is also true of the foreseeability limit.

4/120 The general rule of liability and the concept of fault based on the required duty of care, expressing the objective evaluation of the tortfeasor's conduct under the given circumstances of the case and the social evaluation attached to it, are flexible enough to cover cases of professional negligence as well. There is no special doctrine, assessment or approach to be applied to cases on the liability of experts or professionals. The liability of directors of companies is also covered by this general rule, along with the liability of lawyers, doctors, etc. It is far from clear whether courts consider specific circumstances or use specific evaluation methods in such cases. There is still poorly reported case law, where the courts restrict themselves to establishing only obvious guidelines. What role market practices play in establishing the duties and liabilities of professionals is not clear from relevant case law. In other areas of professional liability (especially in medical malpractice cases), courts tend to regard best practices or settled protocols and requirements as the part of the required standard of conduct which are to be followed by professionals but they cannot be relieved of liability solely by referring to the fact that they complied with them. Thus, courts may require and establish stricter or further standards for the given scenario.

4/121 Especially in medical malpractice cases, courts seem to be shifting liability towards a strict liability regime, not only by applying the rules on providing strict liability for extra-hazardous activities in certain cases but also by reversing the burden of proof of causation, regarding the absence of proper documentation as a kind of presumption of negligence of doctors and moreover allowing exoneration in very few cases. One of the key factors in establishing fault in medical

188 Civil Code 2013, § 6:142.
189 Referred to in fn 192.

malpractice cases is the role of protocols. It has never been clear in court practice whether, if the defendant doctor or medical health care provider proved that they had complied with the relevant professional protocols, this would necessarily indicate compliance with the required duty of care in general, thereby resulting in an absence of fault and thus exoneration from liability. There are decisions declaring that compliance with the professional protocol results in compliance with the required duty of care and thus, an absence of fault[190], and there are also decisions establishing that the absence of a violation of professional rules, standards and guidelines does not preclude establishing fault[191]. Compliance with professional standards and protocols in itself does not prevent the court from establishing the fault of the tortfeasor and consequently, the liability of the doctor or hospital[192]. Professional standards and protocols may be issued by the Ministry of Health, professional associations or implied as common general professional knowledge, eg as part of the materials taught in the universities for medical sciences[193], issued guidelines or generally accepted professional literature[194]. Non-compliance with these standards necessarily results in fault being established but compliance with them does not necessarily mean having complied with the required duty of care[195].

4/122 The liability of directors of companies is embedded in the general rules of liability for damages. A director breaches his duty if he fails to comply with the duties and obligations imposed on him by law. This is the case if a director fails to comply with the duties imposed on him by statutory regulation, the memorandum of association, the resolutions of the company's supreme body, or by his management obligations[196]. The liability of directors follows the normal fault-based liability regime of tort law. There does not seem to be any differentiation elaborated, for example, treating the duty of care and breaches of the duty of loyalty as separate elements or preconditions of liability.

4/123 A director is not liable if he acted according to the required standard of conduct, ie if he complied with the requirements for performing his tasks in conducting the management of the company with due care and diligence as generally required from persons in such positions and, unless otherwise provided by the law, gave priority to the interests of the company. As the required duty of care is an objective measure independent of the personal skills of the tortfeasor, courts follow

190 *Dósa,* Az orvos kártérítési felelőssége (2004) 91.
191 Supreme Court, Legf. Bír. Pfv. III. 22.090/2005 sz. BH 2006 no 400.
192 Supreme Court, Legf. Bír. Pfv. III. 20.956/2006 sz. BH 2007 no 47.
193 Supreme Court, Legf. Bír. Pfv. III. 24.330/1998 sz. BH 1999 no 363.
194 Act no CLIV of 1997 on Public Health Care § 119 (3) b.
195 Supreme Court, Legf. Bír. Pfv. III. 20.761/2008 sz. EBH 2008 no 1867.
196 Company Act 2006, § 30 (2). Such a specific rule is not provided in the Civil Code 2013 but the same approach may be maintained.

objective standards that require directors to conform to the level of an »ordinary director« in a position similar to the defendant.

4/124 It is not clear at all what the relationship between the required duty of care and the requirement of priority of the company's interests could be. Hungarian court practice does not make a clear distinction between these two requirements as it does not distinguish clearly between the breach of loyalty and fault. It is, however, clear that courts do not establish liability simply on the ground that the director made a wrong decision causing damage to the company. There are only very few reported cases on this sensitive and crucial element of liability in Hungarian court practice but one decision may give an insight into the way of thinking of the courts. In this case a director concluded contracts with other partners and undertook the obligation of pre-payment for delivery of goods. The goods were never delivered and pre-payment could not be revoked. The court rejected the claim against the director on the ground that he prepared the transaction with the required duty of care and although it proved to be a wrong decision, it was still within the scope of normal business risks[197].

4/125 Although a clear business judgement rule has not been elaborated or established in Hungarian court practice, courts do not establish liability if the conduct (decision) of the director fell within the frames of normal business risks. Thus, courts do not want to shift the risks of business decisions to directors of companies[198]. If a director fails to protect the assets of a company (to keep the money in a safe place)[199] or concludes transactions clearly beyond the normal business risks (buying diamond mine concessions in Africa)[200] he will have acted negligently and will be liable for damages.

4/126 The system of the Civil Code 2013 providing special rules for contractual liability will put the nature of professional liability into the foreground. The wrongful acts of professionals may cause damage either for their clients or for third parties. Their liability vis-à-vis their clients will be covered by the regime of liability for breach of contract while towards third parties by tort law. Contractual liability will bring a strict liability with a strong foreseeability limit, while the regime of tort law does not bring significant changes in this respect.

4/127 Courts refrain from providing general assessments, guidelines or measures in their judgments on the concept of fault. They normally just establish whether or not the conduct in question complied with the required duty of care under the given circumstances and do not give further evaluation on how persons in similar positions are required to act.

197 Regional Court of Budapest, Fővárosi Ítélőtábla 13. Gf. 40003/2003 sz. BH 2004 no 372.
198 *A. Kisfaludi,* A gazdasági társaságok nagy kézikönyve (2008) 369.
199 *Kisfaludi,* A gazdasági társaságok nagy kézikönyve 370.
200 Regional Court of Szeged, Szegedi Ítélőtábla Pf. I. 20.079/2003 BDT 2004 no 959.

III. Other defects in the damaging party's own sphere

4/128 The principle of *»respondeat superior«* itself is very old going back to the ancient idea of criminal and civil law liability that the household and its head, the »pater familias«, shall be liable for the wrongs committed by the persons belonging to the household community such as wife, children and others. In the structure of Hungarian tort law, however, the liability for children and other persons who do not have the ability to foresee the consequences of their acts is not construed as vicarious liability but the liability of the guardians (parents or other supervisors) on the ground that, in the course of supervision, they failed to comply with the required duty of care. Thus, their liability for failure in raising and supervising the minor or other mentally disturbed persons is a liability for their own negligence which may also cover negligence in raising the child or mentally disturbed person. The basic principle has remained and it has been adapted to the continually[201] developing economic and social circumstances with varying degrees of importance and often with different ideas behind it. As *von Caemmerer* has written, the notion of the liability of the master for the torts committed by his servants was always treated as just and socially necessary[202]. The roots of the liability of employers for their employees may be traced back to this ancient, and in the legal systems in some form always present, principle, but in its present form it is a product of a modern development of tort law. The liability for damage caused by employees in the course of their employment as it stands now in modern private law systems is a result of a relatively new development. It is not a logical necessity of a certain system and it seems that it cannot be based on the inherent principles of any tort law systems today. The liability of employers for damage caused by their employees in the course of their employment is the result of the dominance of business entities and the complex and well organised system of producing and providing services which is the result of the division of labour and which is based on using services provided by other persons for one's own economic interests.

4/129 Under the title »Damage Caused by Employees, Members of Cooperatives, Representatives, and Agents« in the Civil Code 1959 three specific forms of liability were addressed, namely the liability of employers for employees, the liability of principals for agents and the liability of the state for public officers. The Civil Code 2013 provides for one additional specific form of liability: the liability of the management of legal entities[203]. As far as the vicarious liability of the employer is concerned, if an employee causes damage to a third party in connection with

201 Civil Code 2013, § 6:544 (3).
202 *E. von Caemmerer,* Reformprobleme der Haftung für Hilfspersonen, in: Gesammelte Schriften, vol 3 (1983) 286.
203 Civil Code 1959, §§ 348–350. Civil Code 2013, §§ 6:540–6:549, especially § 6:541.

his employment, unless otherwise provided by law, the employer bears liability towards the injured person, provided that the employee himself can be held liable. The employer will be liable for the wrongdoing of the employee if the damaging conduct fell within the scope of his employment. This provision is also to be applied in the case of a member of a cooperative who causes damage to a third party in connection with his membership. Under administrative liability, liability for damage caused within the jurisdiction of government administration shall be established only if the victim exhausted the ordinary legal remedies without success or if there is no common legal remedy to abate the damage. Unless otherwise provided by legal regulation, these provisions shall also be applied to liability for damage caused within the jurisdiction of a court or public prosecutor. As far as liability of principals for agents is concerned, a principal shall be subject to joint and several liability with his agent for any damage caused to a third party by the agent in this capacity. The principal shall be relieved of liability if he is able to prove that he did not act negligently in choosing, instructing, and supervising his agent. This provision shall not apply to the liability of persons who perform activities involving considerable hazard. In respect of permanent agency, moreover, if the principal and the agent are economic organisations, the court shall be entitled to apply the regulations governing the liability for damage caused by employees in the relationship between the aggrieved person and the principal. A client shall not be liable for damage caused by his legal representative. An agent shall be liable to the principal for any damage he causes, as shall a representative not employed by a client to that client. A principal or client is entitled to demand reimbursement from an agent or representative for compensation paid by the agent or representative to a third party. The provisions of the Labour Code and the provisions of separate legal regulations shall be applied to such claims between employees and employers and between cooperatives and their members. If the employee caused the damage deliberately, he shall be jointly and severally liable with the employer[204].

4/130 The underlying policy for this solution has been the idea that the agent and the employee normally act in the interests of their employer and not in their own interests. Liability of the employer and the principal rests on this consideration. The basis of the difference between the employer/employee and the principal/agent relationship is the permanent character of the employment relationship and the temporary nature of the latter. This is primarily a question of legal qualification of the contractual relationship according to its content. That is why the Code provides the possibility to apply the rules of employers' liability to cases where agency has a permanent character. The damage caused by the employee

204 Civil Code 2013, § 6:540 (3).

shall be treated as if it was caused by the enterprise itself so the activity of the employee shall be attributed to the corporate entity. Thus, this question may be put into the light of the concept of legal personality. It makes the problem of employers' vicarious liability on a theoretical as well as on structural level more complex.

4/131 At the heart of this special form of vicarious liability lies a qualification problem, which is also one of the limits of the doctrine, namely the issue of who shall be treated as an employee. In this respect the concept of employee also plays an important role in jurisdictions where, in the context of vicarious liability, the main borderline is to be drawn between employee and independent contractor. The employer is vicariously liable for harm caused by an employee but not for damage caused by an independent contractor. This also implies a constraint of categorisation, since a person is either one or the other. From the point of view of vicarious liability, there is no third possibility. It is obvious that the very important distinction between employee and independent contractor cannot be assessed in the relevant cases according to one or more rigid definitions. If the employee or independent contractor qualification were a direct result of the qualification of the contract between the employer and the person who caused harm, this would lead to an insensitive practice which would not reflect the underlying policies of vicarious liability.

4/132 In Hungarian tort law the decisive factor is the qualification of the contractual relationship between the employer and the employee. The qualification is based on the normal tests for drawing the line between contracts with an independent contractor for services (eg agency contracts) and contracts of service (eg employment or labour contracts) which are different types of specific contracts in Hungarian law. The main differentiating factors are the right and degree of control and instructions, the ownership of the means that are necessary to pursue the given activity, the management of work and the manner of pricing or remuneration. As a main rule, the employee is only the party to an employment contract, for an agent the rule on joint and several liability is applicable and an independent contractor shall not be treated as an employee. There are cases where the court applied employers' vicarious liability to contractual relationships that were not qualified as employment contracts[205] but it seems that, without a contractual relationship, one cannot be treated as an employer of another person.

4/133 The other limitation of the employer's responsibility is that he is only liable for the wrongdoing of someone who shall be treated as his employee if the conduct causing the damage to a third party fell within the course of employment. This means that there must be a link between the employment and the harm caused to another person. Sometimes this seems to be obvious but there are also borderline cases which show that one cannot always decide certain situations by

205 Supreme Court, Legf. Bír. Pf. III. 20.854/1990 sz. BH 1991 no 314.

clear logical means on a theoretical level. Sometimes this problem leads to inconsistency in court practice.

4/134 Some tendencies are evident in assessing whether the employee acted within the scope of employment or not. The issue is very important because it frames the scope of the liability of the employer and determines the risk that shall be shifted to him. One of the tendencies is the abandoning of simple approaches and the application of a more elaborated system of relevant factors. The courts try to take into account all relevant circumstances of the case and they draw such cases into the scope of employment which cannot be regarded as part of the activity but which, according to rough justice and sense of reality, cannot be separated from it, such as committing a crime, lighting a cigarette or abusing functions. The risk of these activities is shifted to the employer. At the same time the courts always demand a link between the act of the employee and the employment relationship. It may be seen as being a pure question of fact but it necessarily also involves legal considerations.

4/135 The formulation »in connection with his employment« is relatively wide since it also embraces cases where the employee acts outside his strictly defined sphere of activity or works outside of the control of his employer[206]. If, for instance, an employee exceeds his authorisation and, as a false procurator, without the right to act in the name of his employer, commits a crime with false documents and orders goods, the employer shall be liable vicariously towards the other party with whom the contract could not be concluded and who knew nothing about the false representation[207]. If a doctor, on the other hand, acts while on holiday outside the territory of his practice without remuneration, his employer is not vicariously liable because his activity is not in connection with his employment[208]. The basis of the vicarious liability of the employer is that the employee committed a wrong for which he should be liable according to tort law and he may exculpate himself by showing that, as an employee, he should not be liable.

4/136 One crucial question to be addressed in the design of a system of vicarious liability is whether the employee remains liable or the vicarious liability of the employer excludes the liability of the employee against the injured party. This seems to be a question of policy. If one stresses the interests of the injured person and assumes that the main goal of vicarious liability is to provide cover for the damage, the best solution may be joint and several liability of the employer and the employee. In this case the creditor may sue whom he wishes and from whom he expects to get quicker and more certain reparation.

4/137 If emphasis is put on the idea that the employee's activity shall be treated as the employer's or when reference is had to the social risk allocation function, one

206 *Gy. Eörsi,* Kötelmi jog, általános rész (1981) 298.
207 Supreme Court, Legf. Bír. Gf. I. 31.500/1993 sz. BH 1994 no 96.
208 Supreme Court, Legf. Bír. Pf. V. 20.063/1995 sz. BH 1996 no 89.

should say that not the employee but only the employer is liable. This was the idea underlying the Hungarian regulation, according to which the injured party may sue only the employer[209], and the employer may seek indemnity according to the rules of labour law which greatly limit the liability of the employee. In this regime only the employer is liable, and he may seek only a limited recovery from the employee according to labour law.

4/138 The weakest point of the vicarious liability regime is that the decisive element is the qualification of the contractual relationship in establishing liability for others' conduct. This system does not leave enough discretion for the courts to establish the relevant connection resulting in vicarious liability and a proper risk allocation. With the flexible system of tort law, only a flexible concept of vicarious liability could be compatible which can allow the courts to weigh up all the relevant factors in the course of assessing if vicarious liability is to be established.

4/139 The Civil Code 2013 does not change the structure of regulation, although it refines it at some points, eg by making the employee jointly and severally liable with the employer in the case of deliberate wrongdoing. The system is amended with a rule covering auxiliaries providing that parties to other contracts are liable for damage caused by their obligor with whom they are in a legal relationship in the course of performing the contract, unless they name the actual tortfeasor[210]. Vicarious liability of the company for the wrongs of the company's officers is also channelled to vicarious liability. As the law stood before the Civil Code 2013, the Company Act provided that the company shall be liable for damage caused by the company's directors in the course of their position[211]. The Civil Code 2013, however, has introduced a new risk allocation regime for directors of companies providing that, if the executive officer of the legal entity causes damage to a third party in connection with his position, the executive officer and the legal entity are jointly liable (towards the victim)[212]. The contours of this new rule of liability are very far from clear. They potentially put a very high risk on managers while court practice is still unpredictable.

4/140 In Hungarian tort law, there are no specific rules that would address liability for things, except one covering liability for damage caused by animals. A distinction is made between domestic and wild animals. For harm caused by domestic animals, the owner shall be liable according to the general rules of liability, while liability for losses caused by wild animals are to be covered with the specific form of vicarious liability.

209 *Eörsi,* Kötelmi jog, általános rész 299.
210 Civil Code 2013, § 6:543.
211 Law no CXLIV from 1997 on business companies [Wirtschaftsgesellschaften] § 29 (3).
212 Civil Code 2013, § 6:541.

IV. Dangerousness

4/141 The general rule of liability with its flexible elements and with the system of reversed burden of proof concerning fault might be enough to relieve the victim of Beweisnotstand (the need for proof) and provide a proper regime of risk allocation for dangerous activities. This rule is in some cases used by the courts in order to create strict liability in cases which normally would not fall into the scope of such liability regimes[213]. This can also clearly be seen in shifting the risk allocation to hospitals in some cases of medical malpractice.

4/142 Hungarian tort law, however, provides a specific regime for liability for extra-hazardous activities. According to this specific regime, a person who carries on an activity involving considerable hazards shall be liable for any damage the activity caused[214]. The operator shall be relieved of liability if he proves that the damage occurred due to an unavoidable cause that fell beyond the scope of the activity involving considerable hazards or resulted from the victim's wrongful conduct. Neither the scope of the considerably hazardous activity nor the carrier or operator of the activity is defined nor are guidelines provided for this. The guidelines for the assessment and scope of the considerably hazardous nature of the activity and defining the person (the operator) who shall be liable for that activity have been elaborated in court practice. In the course of qualifying an activity as considerably hazardous, the court considers all the circumstances of the case. There are activities which under certain circumstances shall be considered as considerably hazardous resulting in strict liability, while under other circumstances they would not. In

213 Through the application of general tort law regulation, court practice could reach the same result as product liability legislation. In a case, decided according to the state of law before enacting the Product Liability Act, a child wanted to buy hydrochloric acid in a shop at the request of her mother. Because of a defect of the bottle, the acid splashed onto her face and made her blind. The claimant sued the shop and the assumed manufacturer. The court rejected the claim against the manufacturer because it turned out that the shop had bought hydrochloric acid from two manufacturers and it was impossible to decide which one of the two manufacturers had produced the defective product. The court found the shop liable on the ground of liability for extremely hazardous activities and established in this way the strict liability of the shop. If the shop as a seller could have proven which manufacturer had produced the product, the manufacturer would have been held liable. The court should reach the same result under the Product Liability Act of 1993. Supreme Court, Legf. Bír. Pf. III. 21.046/1992 sz. BH 1993 no 678.

214 Civil Code 1959, § 345. According to the regime of the Civil Code 2013, § 6:535 f, the operator of an extra-hazardous activity shall be obliged to compensate loss resulting from it. He shall be relieved of liability by proving that the loss was due to an unavoidable cause that fell outside the scope of his activity. The provisions of extra-hazardous activity shall be applied to those who endanger human environment and cause damage with their conduct. Any exclusion or limitation of liability for extra-hazardous activities is null and void; this restriction does not apply to damage to things. The person, in whose interest the activity is carried out, shall be deemed operator of the extra-hazardous activity. If there are more operators of the extra-hazardous activity, they shall be qualified as multiple tortfeasors.

court practice, the operation of motor vehicles or industrial machines, chemicals, explosives, acids or other dangerous materials; activities requiring special prevention such as mining, well-digging, etc are specified as considerably hazardous triggering the application of the strict liability regime. Liability for wild animals and traditional environmental damage are also governed by the regime of strict liability for hazardous activities. Building construction work can also be qualified as extremely hazardous, while certain activities – such as using household machines, using fire (like lighting a cigarette) – are regularly not, even if they can really be dangerous. The concept of extremely hazardous activities establishing the application of this strict liability regime is an open category allowing a wide »playing field« to the courts. Even if there are typical activities belonging to this category, sometimes courts use the openness and abstract nature of this notion simply to allocate risks as they think fit through establishing strict liability. Surgical operations may also be qualified as extra-hazardous activities triggering the strict liability of the hospital although normally the liability of medical health care service providers falls under the fault-based liability regime[215].

4/143 The specific feature of extra-hazardous activities is not only the shifting of the required duty of care towards absolute or objective liability but also that it allocates the risk not to the direct tortfeasor but to the operator of the extra-hazardous activity. The concept of operator – as well as the concept of extra-hazardous activity – is flexible. The owner is the person who is in a position to control the activity, or whose direct interest is pursuing the activity, eg a land-owner who orders chemical vaporisation is to be treated as an operator of the activity and as such will be liable under the strict liability regime[216]. The Civil Code 2013 puts interests in pursuing the activity in the foreground by providing that the person in whose interest the activity is carried out shall be held to be the operator of the extra-hazardous activity[217]. It is not yet clear how this simplified concept would be interpreted in court practice. As, however, »interest« is a concept wide enough to imply complex interpretations, court practice would presumably not change.

4/144 There is no distinction between holding a dangerous thing and pursuing a dangerous activity; holding a dangerous thing can be a dangerous activity falling under the application of liability for extra-hazardous activities according to the normal tests. There is no special form of enterprise liability in Hungarian tort law.

4/145 Strict liability for extra-hazardous activities implies two important features that make the position of the victim easier. First, liability is imposed on the opera-

215 Supreme Court, Legf. Bír. Pf. III. 25.423/2002 sz. BH 2005 no 251. In this case an electric knife was used for a surgical operation and due to sparks from the knife the fluid used for disinfecting the skin of the patient caught fire. As a result the patient burned and died.

216 Supreme Court, Legf. Bír. Gfv. XI. 30.293/2006 sz. BH 2007 no 301.

217 Civil Code 2013, § 6:536.

tor of the activity and not only on the person whose conduct actually resulted in damage. This, in many cases, results in a multiple tortfeasor scenario as the person, eg the driver of a car, is liable according to the general rules of liability, while the operator according to the rules on strict liability for extra-hazardous activities. As the risks involved in such activities are mostly insurable, and actually insured, there is a greater chance for the victim to be awarded compensation for the loss he suffered. Second, there is a very narrow field for the operator because if he cannot prove that the cause of damage fell outside of the scope of the activity *and* was also unavoidable, his liability will be established. Courts applied this specific form of liability successfully for cases addressed by the product liability regime[218].

4/146 In a way, this specific form of liability may result in a better position for the victim than the product liability regime, eg there is no exemption for defects that could not have been apparent due to the level of scientific and technical development. In cases covered by product liability, however, the rules of liability for extra-hazardous activities are not to be applied[219], although Hungarian courts do not seem to have implemented the interpretation given by the CJEU which regards the Product Liability Directive as a maximum harmonisation regime[220].

V. Permitted interference

4/147 There are no specific rules or doctrines covering permitted interference in Hungarian tort law. If the party agreed to interfere with protected interests, it may be a circumstance excluding unlawfulness but only insofar as the wrongdoing is covered by a valid agreement between the parties. If that is not the case, court practice does not address the issue of liability in such cases differently.

VI. Economic capacity to bear the burden

4/148 The capacity to bear the burden of loss may be a relevant factor on a theoretical-structural level and also on a practical level. On a theoretical-structural level it is one of the basic policies underlying employers' vicarious liability that the em-

218 Supreme Court, Legf. Bír. Pf. III. 21.046/1992 sz. BH 1993 no 678.

219 ECJ 25 April 2002 – C-183/00, *Maria Victoria González Sánchez v. Medicina Asturiana SA* [2002] European Court Reports (ECR) I-3901; ECJ 25 April 2002 – C-52/00, *EC Commission v. French Republic* [2002] ECR I-3827; and ECJ 25 April 2002 – C-154/00, *EC Commission v. Hellenic Republic* [2002] ECR I-3879.

220 Supreme Court, Legf. Bír. Pfv. III. 20.288/2008 sz. EBH 2008 no 1781.

ployer can and should internalise risks and can spread the costs of those risks among contracting parties by incorporating them into the costs of production. Thus, costs of risk avoidance can be maintained to an optimum by insurance. The aim of protecting the victim justifies the liability of the employer who is usually financially stronger and there is no reason to set the injured party against the financially weaker employee *(deep-pocket rule).* The employer is able to share the costs of the risk shifted to him through vicarious liability among his own business partners and consumers as he may incorporate it into the price of his products or services[221]. On a practical level it can either be an element of the flexible system, as was suggested by *Marton,* or a rule for reducing liability, as was provided in the Civil Code 1959 and as has been provided in the Civil Code 2013. This provision gives the court the opportunity, for special reasons of equity, to award damages lower than the loss suffered[222]. The financial position of the parties is sometimes an apparent element of risk allocation even if courts do not expressly refer to it[223].

VII. Realisation of profit

4/149 That risk should fall where the profit emerges is a general principle of risk allocation which is also one of the bases of vicarious liability. It does not seem, however, that this view could become a doctrine in Hungarian tort law. Although this may be an implied factor in decisions, so far courts have not explicitly referred to it. This is certainly part of the test of the required standard of conduct but as the arguments brought by the courts are normally not very clear and detailed in this respect, it is difficult to assess on the basis of reported cases. This could also have been a good basis for introducing enterprise liability but this was not considered in the course of preparations of the Civil Code 2013.

VIII. Insurability and having insurance cover

4/150 There are no – and actually none have ever been recorded – comparative statistics available which could prove that courts are more ready to award damages if the

221 *Von Caemmerer,* Reformprobleme der Haftung für Hilfspersonen 290 f.

222 Civil Code 1959, § 339 (2); Civil Code 2013, § 6:522 (4).

223 Supreme Court, Legf. Bír. Pfv. III. 22.064/2004 sz. EBH 2005 no 1207, where the courts awarded damages to the widow and orphan of a man who died in the course of trying to rescue another driver and his car. The defendant was the motorway operator.

ultimate risk bearer is not the defendant but an insurance company. The tendency, however, seems perceptible that it is much easier for the plaintiff to get compensation if an insurance company is the defendant. Courts incline toward awarding damages if the defendant is an insurer or if there is third-party insurance coverage available for the defendant. Proving this, however, is very difficult but this may be a factor in expanding professional liability in fields where insurance is available for the potential defendants, even if third-party insurance is not a basis for establishing liability. In cases where the insurance company can be directly sued, this tendency may be strengthened by the fact that insurance companies mostly try to refer to the insurance contract in order to get out of their obligation to pay and are less likely to establish their defence on the liability case itself.

IX. The notion of a risk community

4/151 Insurance creates a mechanism that not only shifts the risk but also spreads it among the members of the risk community. This risk spreading is not only a contractual risk allocation between the insured and the insurance company but also an overall model. Not only product liability, but also the system of contractual guarantees or other remedies for breach of contract in general can be modelled according to this mechanism if the party bearing the contractual or statutory obligation is in a position to spread the costs of the risk involved among its contracting partners (consumers). Companies providing services for a wide range of consumers, eg car rental companies, also create a risk community among their clients and incorporate the losses into their prices. They also apply contractual methods, especially in pricing policies for managing the two structural problems of insurance, moral hazard and adverse selection. Insurance as a risk-spreading model is an important factor in creating risk communities by regulation like product liability, statutory guarantees, consumers' rights, etc.

X. The interplay of liability criteria

4/152 In theory, there are four prerequisites for liability that are to be defined independently from each other: damage, unlawful behaviour, causal link and fault. Hungarian tort law is a system of a reversed burden of proof: a causal link between the behaviour of the defendant and the damage are to be proven by the plaintiff while unlawful behaviour is presumed. In order to be relieved of liability, the plaintiff has to prove that his conduct was lawful or that he complied with the required

duty of care or other specified grounds for exoneration are present (in the case of specific forms of liability). The prerequisites for liability, however, never work in such a way in the flexible system of tort law.

4/153 The correlation between the content of fault and the dangerousness of the activity is already presented on the level of statutory provisions as there is a strict liability regime provided for extra-hazardous activities. Where liability is strict under fault-based liability regimes, like in medical malpractice cases, it is not clear if the ground for this is the danger involved or the high ranking of protected rights and interests (life, health, bodily integrity). It seems that in the structure of Hungarian law such correlations are properly managed by the specific form of liability for extra-hazardous activities, which is a flexible regime itself, leaving it to the judge to decide which cases are to be brought under this specific regime and the system of reversed burden of proof as well as the flexible and objective concept of fault.

4/154 Such interplays, however, exist on a structural level too. Not only can the concept of fault and unlawfulness not be clearly distinguished in practice, as risk allocating elements, but also fault and causation can overlap as categories. The response of the courts to the problems of pure economic loss or to the problem of loss of a chance can be described and approached either as a problem of the concept of damage or as causation. Hungarian theory and practice incline to treat them as a problem of causation.

XI. Contributory responsibility of the victim

4/155 The structure of contributory negligence of the victim may be seen and described in more than one way. This may be a reason why different theories can be formulated on this matter. As it is beyond doubt that under the regime of liability in tort, only losses caused by other persons can be allocated to them and the victim has to bear the loss he caused himself, these different ways seem to lead to the same result. The Civil Code itself offers different structures for contributory responsibility.

4/156 In the absence of specific regulation, contributory responsibility can be described as a multiple tortfeasors' scenario where the victim and the other tortfeasor(s) caused the damage jointly. In their internal relationship they are proportionally liable as multiple tortfeasors in general and the victim has to bear part of the loss according to his contribution. The Civil Code 1959, at the same time, explicitly established an obligation for the victim to prevent losses and avoid the consequences of wrongdoing as it provided that, in order to prevent and mitigate damage, the victim was obliged to act as generally expected under the given circumstances. This rule was a mirror image of the fault-based liability regime, in

compliance with the principle of equal treatment. Damage which occurred as a result of a failure to comply with this duty was not compensated. This rule provided a solution for liability for the conduct of auxiliaries as it also provided that a victim was liable for omissions by persons for whom he was responsible. The Civil Code 2013 has maintained this approach and has refined this norm by amending it with a rule that damages shall be divided among the tortfeasors in proportion to their wrongful conduct or in absence of this, in proportion to their contribution. If the proportion of the wrongful conduct and of the respective contribution cannot be established, the damage shall be compensated by each tortfeasor in equal proportions[224]. Contributory responsibility can never result in eliminating the liability of the tortfeasor.

4/157 Moreover, under the heading of »liability for extra-hazardous activities«, the regulation provides that a loss shall not be compensated to the extent that it was the result of the victim's negligence[225], but that the dangerous nature of the activity must fall into the sphere of the operator, which normally results in applying stricter standards to the operator than to the victim[226]. Courts have a wide discretionary power in weighing the circumstances of the case, evaluating the conduct of the parties and considering the other elements of the flexible system when deciding the ratio of risk allocation between the parties. In the context of application of this specific rule, it was not clear how the contribution of persons without capacity could be taken into account. Court practice resolved this problem by establishing that the contribution of such persons is irrelevant and is not a proper ground to reduce or limit the liability of the operator[227]. The Civil Code 2013 provides a clearer picture providing that the operator is not obliged to compensate damage resulting from the contributory negligence of the victim. When apportioning the damage, the extra-hazardous quality shall be taken into account to the detriment of the operator. If a person who is not capable of foreseeing the consequences of his conduct contributes to causing damage, the operator is liable for this person. The operator shall be entitled to enforce claims against the supervisor of such persons[228]. It seems that, although in the context of liability for extra-hazardous activ-

224 Civil Code 1959, § 340; Civil Code 2013, § 6:525. The injured person is obliged to prevent and mitigate the damage. Damage which occurs as a result of breaching this obligation wrongfully shall not be compensated. Damage shall be divided among the tortfeasor and the injured party in proportion to their wrongful conduct or, in the absence of this, in proportion to their contribution. If even the proportion of their contribution cannot be established, the damage shall be compensated by the tortfeasor and the injured party in equal proportions. The injured party is liable for omissions of those for whom he is liable.

225 Civil Code 1959, § 345 (2).

226 Supreme Court, Guideline PK no 38.

227 Supreme Court, Guideline PK no 39.

228 The rule incorporates court practice as it stands according to the Guidelines PK nos 38 and 39 (Supreme Court). Civil Code 2013, § 6:537.

ities there is a specific rule provided for the contributory negligence of the victim that is refined and precisely described in court practice, the basic thought behind the regimes remains the multiple tortfeasors' scenario with the correction that if both the operator and the victim suffered damage, the loss among them shall not be shared according to the general rules but has to be done by shifting the burden of the extra-hazardous nature of the activity to the tortfeasor.

Part 7 Limitations of liability

I. The basic problem of excessive liability

4/158 The limitation of liability is as much inherent to a tort law system as liability itself. The conclusion that »tort law is as much about non-liability as it is about liability«[229] also holds true for Hungarian tort law. From the flexible structure of tort law, it follows that in the two most important aspects of liability, ie accountability and causation, the legislator allows leeway to the greatest extent to court practice, leaving the consideration of the case entirely in the hands of the judge. This means that if one tries to seek the limitations of liability, they can also be found in court practice. An exception is the statutory authorisation for the courts to reduce damages on equitable grounds.

4/159 From the flexible nature of tort law follows that the regulation itself does not fix the limits of liability but leaves it mostly to court practice without providing guidelines on these limitations. This was partly a divergence from the former private law, partly a result of development. Former Hungarian private law, before World War II, elaborated two important limitations. One of these limitations was that economic loss, regardless of whether it was »pure« or not, according to the modern terminology, could have been compensated only in cases of intention or gross negligence. In cases of simple negligence, only the actual damage (damnum emergens) could have been compensated but not the economic loss[230]. The other important limitation was that even if our tort law did not accept the foreseeability limit as a general restriction[231], the courts applied it in a great bulk of cases and explicitly referred to it. The first limitation, compensating economic loss only in cases of intention or gross negligence, has been reduced. The Draft of the Civil Code of 1928[232] provided that »extraordinary damage, which occurs as a result of a random interference of such circumstances which could not have been foreseen by the tortfeasor, is to be compensated only if intention or gross negligence rests on the tortfeasor«[233]. The second limitation, the foreseeability limit, was not included as a special rule in the Civil Code 1959. The reasons for abandoning it are

229 *C. von Bar,* Gemeineuropäisches Deliktsrecht, vol 2 (1999) in FN 1.
230 *Grosschmid,* Fejezetek kötelmi jogunk köréből I (1932) 671.
231 *Grosschmid,* Fejezetek kötelmi jogunk köréből I 658.
232 § 1111.
233 The foreseeability limit was applied in court practice but no unified and consequent court practice had been developed regarding the problem of what kind of losses shall be treated as too remote. *A. Almási,* A kötelmi jog kézikönyve (1929) 172.

not entirely clear but from theoretical explanations of tort law regulation, it does appear that, on the one hand, the foreseeability of the caused harm is implied in the test of accountability[234] and, on the other hand, the legislator might not want to bind the hand of the judge with such limitations and has left the problem of too remote causation or too remote damage to be solved in court practice. The Civil Code 2013 does not change this. Rules covering causation, however, have been amended by a foreseeability limit[235] in order to provide a normative tool and a reference to the courts in order to limit liability in the context of causation, but this does not change the law as it stands in court practice[236].

II. Interruption of the causal link?

Eörsi, whose liability theory most influenced the tort law system of the Civil Code 1959, in an essay in 1985 about the limits of indirect causation[237], tried to list the possible limitation measures within causation. His starting point was that the principle of full compensation and causation are two main pillars of tort law regulation. Causation is, however, a chain, which flows from the past to the future extending at the same time in different, divergent branches creating new chains of causes. Such being the case there are many situations where full compensation is »summum ius, summa iniuria«. It is obvious that tort law must avoid such situations and the main way to do this is by limitation of liability, even when it is impossible to draw the exact boundaries of indirect causation or indirect damage. **4/160**

According to *Eörsi* these possible limitation measures are: **4/161**

a. restricting liability to foreseeable harms;
b. the doctrine of adequate causality;
c. the doctrine of normal consequences;
d. the test of remoteness of damage;
e. the doctrine of organic causal connection;
f. the risk allocation aspect;
g. the principle of proportionality;
h. the doctrine of reasonable connection between the harm and the threat.

234 *Eörsi,* A jogi felelősség (1961) 102.
235 The causal link shall not be established in connection with losses which were not and could not have been foreseen by the tortfeasor. Civil Code 2013, § 6:521.
236 *Lábady* in: Vékás (ed), A Polgári Törvénykönyv magyarázatokkal (2013) 945.
237 *Eörsi,* A közvetett károk határai (1981) 59.

4/162 These measures are the main possible means of doctrinal limitation of liability and they provide appropriate guidelines for Hungarian legal practice. *Eörsi* reckons that foreseeability not only has a limitative effect, but an extensive one also. Abstract foreseeability, on the one hand, has a limitative effect, because only actual foreseeability establishes liability, but actual foreseeability, on the other hand, may also be established in cases where the concrete process of the case could not have been foreseen[238].

4/163 To sum up how these doctrines contribute to Hungarian court practice, one can say that the court may limit liability and refuse full compensation by dismissing the claim for damages if the harm was:

- unforeseeable to the tortfeasor (foreseeability doctrine);
- beyond rational probability, untypical or unique (adequate causality);
- beyond the normal consequences and too unexpected[239];
- a too remote consequence of the tortfeasor's conduct[240];
- caused at least in part by the interference of an unexpected cause in the causal link which altered the normal foreseeable consequences[241];
- within normal risk imputed to the aggrieved party[242]; or if full compensation would be disproportionate considering the amount of damage and the degree of fault[243].

4/164 These doctrines and guidelines are to be treated as elements of a flexible system which provide, through the open rules of tort law regulation, the measures to carry out appropriate risk allocation. Court practice has found its limitation

238 *Eörsi,* A közvetett károk határai 62.

239 That was the reason for dismissing the claim against a hospital in a case where a mentally ill person fled from the hospital, got on a train without a ticket and when the controller asked for the ticket, committed suicide by jumping out from the train. *Eörsi,* A közvetett károk határai 62.

240 This is the case where someone cuts a telecommunication earth-cable with a machine during excavation works and thousands of people (including factories) remain without telephone services and because of the damaged cable it is impossible to call the police, the fire brigade or the ambulance. In this case the tortfeasor shall not be liable for all these further consequential losses, because they are too remote. *Eörsi,* A közvetett károk határai 63.

241 This may be used as a limitative factor if the tortfeasor tempts a child to commit a crime and because of this the child's mother commits suicide. For the death of the mother, the tortfeasor shall not be liable. *Eörsi,* A közvetett károk határai 63.

242 This is the basis of the limitation of liability if someone destroys a bridge or causes an accident and because of it traffic is diverted to a longer route. The diverting of traffic is an event which may occur for a number of reasons, even (and mostly) without someone's fault; this is why it is an event that everyone must reckon with and as such it is a general risk of life (allgemeines Lebensrisiko). This risk must be run by everyone and others cannot be held liable for this. *Eörsi,* A közvetett károk határai 64.

243 If in a so-called cable-case, a whole district remains without electricity because of the conduct of the tortfeasor whose negligence was not gross, the liability includes the costs of reparation and the economic loss of the electricity operator but not the harm and loss of the people and businesses who are left without electricity. *Eörsi,* A közvetett károk határai 65.

measures in order to optimise risk allocation within the complex concept of accountability and in causation instead of by a doctrine based on pure economic loss or such a category. Hungarian courts incline to cut off the causation link at losses deemed too remote, and they use the concept of accountability to reduce the tortfeasor's liability to foreseeable losses or they simply solve the problem regarding the causal link and the amount of the damage due with the burden of proof. The burden of proof is a very effective measure in the course of risk allocation, also regarding economic loss: the plaintiff has to prove that if the tortfeasor's conduct had not occurred, he certainly would not have suffered loss or with absolute certainty would have earned a certain profit.

III. Adequacy

4/165 Legal causation would seem to be a reasonable tool for limiting liability and a huge amount of literature has been built upon different theories of adequacy. It seems, however, that court practice does not use such theories and there has never been a proper description provided on how such theories would work in a predictable manner. It seems that theories of adequacy prove to be a dead end and the product of the general misunderstanding of the nature of causation of law and the failure of attempts to apply the philosophical concept of causation to causation in law.

IV. The protective purpose of the rule

4/166 Although the protective purpose of the rule is an important factor for limiting liability, neither in court practice nor in theory has such a doctrine been established. Teleological interpretation is accepted in Hungarian private law as well, although it is difficult to assess to what extent and in what sense as it is not referred to in judgments. The protective purpose of the norm has not yet been formulated in Hungarian court practice or legal theory in the form in which it is present in German and Austrian legal doctrine. In spite of this, the function of legal institutions, including the goal of the legislator and the purpose of the rule, play an important rule in risk allocation. This happens, however, mostly by rejecting a claim on the ground of absence of a causal link without referring to such a doctrine. It seemed that the theory on the doctrine of protective purpose of the norm started to develop in professional discussions on contractual and non-contractual liability but further improvements are still not detectable. Professional debates on indirect

causation so far have been focused on the problem of whether the damage suffered by a company can be a ground for a tort claim by a shareholder (member) of the company too, referring to the shareholder's loss suffered in the value of the share. Neither these debates nor court practice reached the conclusion that the tortfeasor's mostly contractual obligations are limited in their scope to protecting the company's interests and should not cover the protection of its shareholders' interests. An approach is, however, taking shape that if the plaintiff bases his tort claim on conduct constituting a breach of a contractual obligation vis-à-vis himself or third parties, the tort claim shall not be decided without deciding the contractual claim. Deciding the claim for damages for breach of contract, ie establishing liability for breach of contract, is a necessary preliminary question in respect of the tort claim in such cases and the court has to take into account the fact that the contracting parties enjoy privity as a main rule, ie a contract creates obligations vis-à-vis the other contractual party but not vis-à-vis anyone else[244]. Later, in a judgment, the Supreme Court established that the lawful termination of a contract for a loan with a company does not establish any claim of a shareholder for damages vis-à-vis the bank that terminated the contract for the loan. The Supreme Court, however, did not go as far as establishing that shareholders' claims for indirect damages on the basis of the damage suffered by the company (eg as compensation for loss in the value of the shares) are to be excluded *per se*[245].

244 *Fuglinszky/Menyhárd,* Felelősség »közvetett« károkozásért (2003) 283 ff.
245 Supreme Court, Legf. Bír. Gfv. IX. 30.252/2005 sz. BH 2006 no 117.

Part 8 Compensation of damage

I. Extent of compensation

4/167 As a main rule, the party liable shall be obliged to restore the original state and shall be liable for damages if restoring the original state is not possible without violating the interests of the victim. The primary obligation for restoring the state has not been maintained in the Civil Code 2013 but this does not change the starting point that Hungarian tort law rests on the principle of full compensation.

II. Types of compensation

4/168 Thus, the tortfeasor who is responsible for the damage shall be liable for restoring the original state, or, if this is not possible or if the aggrieved party refuses restoration on a reasonable ground, will be liable to compensate the aggrieved party for pecuniary and non-pecuniary damage. Compensation must provide for any depreciation in the value of the property belonging to the aggrieved person and for any pecuniary advantage lost due to the tortfeasor's conduct as well as for compensation of the costs necessary for the attenuation or elimination of the victim's pecuniary and non-pecuniary loss. Under pecuniary loss, actual damage (damnum emergens), lost pecuniary advantage (lucrum cessans) and costs necessary for the attenuation or elimination of the victim's pecuniary and non-pecuniary loss are to be understood. Actual loss is diminution in value of the victim's property as a result of loss, destruction of or damage to a thing and the loss of value remaining in spite of repairs or the sum or value of services paid to another person as a result of the tortfeasor's act, such as penalty, compensation, etc. Lost pecuniary advantage is the lost salary, profit or alimony, as far as the alimony has been provided as a gratuity, provided that such advantage was legal and morally acceptable. Costs necessary for the attenuation or elimination of the pecuniary loss cover costs that were reasonably necessary in order to avoid or reduce the loss or the consequences of it including costs arising from death (like burial) or personal injury (costs of medical care, implants, visits to the hospital, traffic costs), costs of repairs and costs of enforcing one's rights. Compensable pecuniary loss is always a net value, ie the negative balance of gains and losses suffered as the result of the tortfeasor's act[246].

246 *Eörsi,* A polgári jogi kártérítési felelősség kézikönyve (1966) 123 ff especially 193.

4/169 This approach implies the principle of full compensation which is followed very strictly in Hungarian court practice and sets the limits of liability too as it supposes damages as a compensation for compensable loss. Normally it is the market value that is awarded as compensation for actual patrimonial loss. According to prevailing theories in Hungarian tort law, the main functions of liability in private law are reparation and prevention. These are also the underlying policies of the current system of tort law. A general principle of Hungarian tort law is that the victim should be prevented from making a profit on the loss. It seems that restitutionary damages or claims for the gained benefit to be shifted from the tortfeasor to the victim (in order to deprive the tortfeasor of the profit that he gained from the wrongful conduct) are compatible with the principles and policies underlying Hungarian tort law[247]. Thus, in the course of calculating the sum of damages to be awarded, the amount of damages shall be reduced by the sum that the victim earned or saved as a result of the damage eg payments under a national health care system[248] or an increase in value of the victim's property as a result of the event which caused damage. In line with the principle of full compensation, the plaintiff shall be compensated for all the losses that he suffered but may not receive an extra income[249].

4/170 Damages also cover losses that will be suffered as a consequence of the wrongdoing in the future, including lost earnings. Loss of working capacity itself (without at least presumed loss of earnings) does not seem to be an accepted type of compensable loss in Hungarian tort law. It seems that even if courts speak of loss of working capacity in the context of damages, they understand presumed loss of earnings. The victim is to be compensated for loss of earnings resulting from the injury he suffered[250]. Loss of earning capacity is compensated by the compensation received for loss of earnings which is indemnified based on the victim's predictable income in the future. In the course of calculating the compensation for loss of earnings, however, the actual status of the victim is not necessarily decisive. The basis for the calculation of damages is the actual (lost) earnings of the victim[251], while the reference for calculating the compensation for lost earnings in the future is the average earnings of people who have the same or a similar job to that of the victim before he lost it as a result of the injury suffered. This holds true also in the context of increasing the annuity (periodical payment) awarded earlier as damages[252].

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247 *Marton,* A polgári jogi felelősség (1993) 117.

248 Supreme Court, Legf. Bír. Mfv. I. 10.244/2002/3 sz. EBH 2002 no 695; Supreme Court, Legf. Bír. Mfv. I. 10.744/2006 sz. BH 2007 no 354; Supreme Court, Legf. Bír. Mfv. I. 10.697/2006 sz. BH 2007 no 274.

249 *Gellért* (ed), A Polgári Törvénykönyv Magyarázata (2007) comments to § 355 no 4.

250 Supreme Court, Guideline no PK 45.

251 Supreme Court, Guidelines nos PK 45 and 46.

252 Supreme Court, Legf. Bír. Pf. III. 21.218/1998 sz. BH 2001 no 15.

These principles elaborated in theory and court practice are reinforced in the rules of the Civil Code 2013 too. **4/171**

III. Periodic or lump sum

The principle of full compensation requires compensating the victim for all the losses he suffered as a result of the tortfeasor's wrongful conduct. It is up to the court to decide whether compensation in one lump sum or in the form of periodic payments is the most appropriate form of indemnification[253]. Basically, there are two ways of providing compensation for losses that are uncertain in their amount either because they will only arise in the future or because, although they have already been incurred by the victim and their existence is proven as a fact, their amount is impossible to prove. **4/172**

One possible way of compensating losses of an uncertain amount is awarding general damages. General damages (as lump sum compensation) are to be awarded if the extent of the damage – at least partly – cannot be precisely calculated. In such a case the tortfeasor can be compelled by the court to pay a lump sum of general indemnification that would be sufficient to provide the victim with full financial compensation. Awarding general damages is regarded as full and final compensation and there is no possibility to reclaim a lump sum general indemnification on the grounds that the extent of actual damage did not subsequently equate with the amount of the general indemnification. If, however, the obligor is paying an annuity as general indemnification, he shall be entitled to demand a reduction in the amount of the annuity or a change in the annuity payment period in accordance with any changes in the relevant conditions. Courts normally try to avoid awarding lump sum compensation amounts and do so only if it was impossible to prove the amount of loss although the fact of suffering compensable loss is proven (difficulties in proving the amount of the loss suffered itself is not a sufficient basis for awarding such compensation)[254]. **4/173**

The other possible way of compensating future losses is awarding damages as a periodical payment in the form of an annuity. As a general rule, compensation may be awarded in the form of an annuity as well. An annuity is normally awarded if indemnification is designed to support or assist in the support of the aggrieved person or those of his relatives who are entitled to be supported by him. **4/174**

It seems that in regulation and in court practice, awarding annuities dominates over lump sum compensation if there are future losses to be compensated. **4/175**

253 Supreme Court, Guideline no PK 48.
254 Supreme Court, Guideline no PK 49, Legf. Bír. Gf. VI. 30.036/2002 sz. BH 2003 no 249.

This may be the influence of the practice of the socialist era but it also may be inevitable that annuities may be a more just and correct method of compensation as they can be adapted to future changes. Awarding a lump sum compensation amount for future losses necessarily involves a weighing up of probabilities involving the problems of discounting the future loss from the recent value. It may, however, be more compatible with the market economy and has the benefit of closing the claim. As there is actually no practice of Hungarian courts awarding lump sums as compensation of future losses, it is not clear how such an award would be calculated and discounted.

IV. Reduction of the duty to compensate

4/176 Generally, there are no statutory caps or thresholds for damages and caps or thresholds have not been developed in court practice either. The courts follow the principle of full compensation which implies only that they reduce the awarded compensation in accordance with damage that has already been compensated from other sources, like payments from the national health insurance, disability pensions, earnings on the loss, etc. In general neither statutory regulation nor court practice provides liability caps under the non-contractual liability regime[255]. Regulatory caps are provided only in very specific cases[256]. Otherwise, the statutory capping of liability is not a typical solution for limitation of liability in Hungarian tort law. There are no caps in court practice although in some cases court practice limits liability only to compensation of actual damage and does not accept claims for compensation of lost profit (such as damages for illicit tendering). Statutory caps seem to take as a starting point that the tortfeasor's overall liability is capped by a maximum amount without making a distinction between primary and consequential loss or postulating the plurality of several independent losses.

255 There are statutory liability caps for certain cases of contractual liability (mainly in the field of carriage of persons and goods and providing hosting services like hotels, public houses, etc) but – taking into consideration the scope of the project – I shall not address them in this report.

256 Act no CXVI. of 1996 on Nuclear Energy, eg provides in its § 52 that liability of the operators of nuclear plants, nuclear heating plants and operators of factories producing, processing or storing nuclear fuel shall not exceed the sum of SDR 100,000,000 per accident. Liability of operators of other types of nuclear establishments and liability for compensating damage occurring in the course of transporting or storing nuclear fuel shall not exceed the sum of SDR 5,000,000 per accident. The Hungarian state shall be obliged to compensate damage that exceeds this limit but the whole sum to be paid shall not exceed the sum of SDR 300,000,000. There also are caps for specific cases of contractual liability such as liability of air carriers or operators of hotels and public houses.

Part 9 Prescription of compensation claims

I. The basic principles of the law of prescription

Although it may seem normal to lawyers that claims expire after a certain period of time, it is far from being self-evident that, if the creditor fails to exercise the right allocated to him by law, he may lose it automatically. Although there may be serious concerns about whether such results are compatible with the protection of property in a constitutional sense or from the point of view of protecting property as a human right, the protection of reliance on the other party's conduct, even if it is the non-exercising of a right, may be proper ground for the legislator or for court practice in balancing the interests of the parties this way. There are basically three technical solutions for extinguishing claims or barring the creditor from turning to court in order to enforce his claim. **4/177**

The first is prescription, which results in the creditor not being able to enforce his claim via judicial procedure, ie he is barred from turning to the court with the claim. The problem with prescription is that legal systems normally accept that this period can be interrupted and begin anew and also can »rest« and continue again. This may leave the debtor in an uncertain position about whether the creditor can or will enforce the claim against him or not. The second approach is establishing dates of expiration that set out when the claim ceases to exist. The advantage of fixed expiration dates is that they make the positions of the parties clear; the disadvantage is that it can result in overly harsh consequences for the creditor by depriving him of his position even if he could not enforce it due to grounds that fall beyond his control. The third solution is that courts interpret general clauses of private law, like good faith and fair dealing or the generally required duty of care in a way so as to imply a duty to act in order to enforce claims if this can affect the position of other parties. Hungarian court practice construed the general clause of good faith and fair dealing and the required duty of care as implying a deadline for having recourse to the court in cases of transfer of property with interference in pre-emption rights of the plaintiff. The court established in some such cases that, if the beneficiary of the pre-emption right failed to turn to court in a reasonable time after discovering the wrongful interference with his right, he should be deprived of his right[257]. **4/178**

257 Supreme Court, Legf. Bír. Pfv. VI. 20.040/2010 sz. BH 2010 no 296.

II. Present legal position

4/179 The general period of limitation for claims in Hungarian law is five years, unless otherwise prescribed by law. In tort law, there are basically two exceptions. This period starts at the time of occurrence of damage as it is the point in time that the obligation to compensate the victim becomes due[258]. One exception is that claims for damage resulting from extra-hazardous activities shall be prescribed after three years; the other is that if the harm was caused by a crime, the prescription period for damages cannot be shorter than the prescription period for criminal law liability. After the prescription period elapses, the claim cannot be enforced in court. The period of limitation commences on the due date of the claim. If the creditor is unable to enforce a claim for an excusable reason, the claim shall remain enforceable for an additional year from the time when the said reason is eliminated or, in respect of a period of limitation of one year or less, it stays valid for three months after such reason is eliminated, even if the period of limitation has already lapsed or there is less than one year or three months, respectively, remaining thereof. This provision also applies if the creditor has granted respite for performance after expiration. This means that in the system of the Hungarian law of obligations today, the »standstill« of the claim means an additional deadline applies in respect of the creditor turning to the court, whereas the prescription does not continue.

4/180 The period of prescription can be interrupted by a written notice for performance of a claim, the judicial enforcement of a claim, the amendment of a claim by agreement (including its content), and the acknowledgment of a debt by the obligor. The period of limitation shall recommence after suspension or following the non-appealable outcome of a suspension proceeding. If a writ of execution is issued in the course of a suspension proceeding, the period of limitation shall be suspended only by the acts of enforcement. This system of interrupting prescription remains structurally similar in the Civil Code 2013, although written notice in itself is not sufficient ground for interrupting prescription. Basically, the law requires the creditor to turn to the court during the prescription period in order not to lose the right to enforce the claim.

4/181 The limitation period starts to run only at the time the obligation is due. Liability for damages cannot be due until the harm has occurred and this holds true even for damage which could have been foreseen. If the victim suffers damage as a result of the tortfeasor's conduct but damage resulting from the same conduct occurs at different points of time, the claims for compensation of damage are to be due according to the occurrence of the damage event, each adjusted to the points

258 Civil Code 1959, § 360 (1); Civil Code 2013, § 6:532. Damages are due immediately from the date of the occurrence of damage.

of time of occurrence. These points of time establish the commencement date of the limitation periods for each compensation claim[259].

III. Attempt to find rules on prescription that are consistent with the system and value judgements

Perhaps it is impossible to establish a proper period of prescription. Balancing the interests of parties in different positions cannot be resolved on an abstract level. Preparing enforcement consumes very different amounts of time. Especially in cases of personal injury, the victim has to arrive at the position of defining the injury and the losses resulting from it. If treatment takes several years and future incomes are to be assessed, this may take years while in a simple case of a car crash without personal injury, the victim may be required to turn to the court within months. **4/182**

The best solution could be to require the creditor to turn to the court within a reasonable period of time, with a general clause which would allow the courts to assess what the reasonable time under the given circumstances was[260] and fixing a statutory date of expiration of claims in order to allow the conclusion of open claims. Such a solution, however, seems to be unacceptable for a practice which requires fixed and concrete rules; such a demand was expressed many times in the course of drafting the Civil Code 2013. **4/183**

259 Supreme Court, Legf. Bír. M. törv. II. 10.106/1976 sz. BH 1977 no 167.

260 As Hungarian courts did in the context of enforcing pre-emption rights on the basis of the general clauses of good faith and fair dealing and required a duty of care. Supreme Court, Legf. Bír. Pfv. VI. 20.040/2010 sz. BH 2010 no 296.

Appendix

Act V of 2013 on the Civil Code

Part Four
Non-Contractual Liability for Damages

XXVI. Title
General Rule and Common Rules of Liability

6:518. §
[General prohibition of causing damage]

Causing damage unlawfully shall be prohibited by the law.

6:519. §
[General rule of liability]

Whosoever unlawfully causes damage to another person shall be liable for such damage. He shall be relieved of liability if he proves that his act was not wrongful.

6:520. §
[Unlawfulness]

All of the wrongdoings causing damage shall be deemed unlawful, except if

a) it was caused with the victim's consent;

b) it was caused to an aggressor in the course of warding off an unlawful attack or the threat of an imminent unlawful attack in so far as such conduct did not exceed what was necessary to ward off the attack;

c) it was caused in necessity, in so far as it was proportionate; or

d) it was a conduct permitted by the law and the conduct did not interfere with legally protected interests of another person or the law otherwise provides for paying compensation to the aggrieved person.

6:521. §
[Foreseeability]

A causal link shall not be established in connection with losses which were not and ought not to be foreseen by the tortfeasor.

6:522. §
[The extent of obligation to provide damages]

(1) The tortfeasor shall provide full compensation for the losses of the victim.

(2) Under full compensation the tortfeasor shall provide compensation for

a) the depreciation in the value of the victim's property;

b) any pecuniary advantage lost due to the damage; and

c) the costs necessary for the elimination of the pecuniary losses suffered by the victim.

(3) Damages are to be reduced by the victim's benefit that resulted from causing the loss to him, except if this is not justified by the circumstances of the case.

(4) For special reasons of equity, the court may award damages in a lower sum than the loss suffered.

6:523. §
[Danger of loss]

In case of danger of suffering loss, the person in danger may ask the court, according to the circumstances of the case,

a) to prohibit the person who threatens to cause damage from proceeding with dangerous conduct;

b) to oblige him to implement measures to prevent the damage;

c) to oblige him to give security.

6:524. §
[Multiple tortfeasors]

(1) If two or more persons caused damage jointly, they are jointly and severally liable.

(2) The court shall be entitled to exempt the tortfeasors from joint and several liabilities if the injured party contributed in the occurrence of damage or this is reasonable under special and equitable circumstances. In the case that the court refrains from holding the tortfeasors jointly and severally liable, the court shall declare their liability in proportion to the extent of their wrongful conduct or if the former cannot be determined in proportion to the extent of their contribution. If the proportion of contribution cannot be established, the damage shall be compensated by each tortfeasor in equal proportions.

(3) Damage shall be borne by the tortfeasors proportionally according to their wrongful conduct; if the proportion of wrongful conduct cannot be established, damage shall be borne by the tortfeasors in proportion to the extent of their contribution. If even the proportion of contribution cannot be established, damage shall be borne by each tortfeasor in equal proportions.

(4) The provisions of multiple tortfeasors shall be applied if the damage might have been caused by any one of the several courses of conduct engaged in at the same time, or it cannot be established, which conduct caused the damage.

6:525. §
[Contribution of the injured party]

(1) The injured person is obliged to prevent and mitigate the damage. Damage which occurs as a result of breaching this obligation wrongfully shall not be compensated.

(2) Damage shall be divided among the tortfeasor and the injured party in proportion of their wrongful conduct or in absence of this, in proportion to their contribution. If even the proportion of their contribution cannot be established, the damage shall be compensated by the tortfeasor and the injured party in equal proportions.

(3) The injured party is liable for omissions of those for whom he is liable.

6:526. §
[Prohibition of limitation and excluding of liability]

Any contractual clause which limits or excludes liability for damage arising from deliberate conduct or injuring life, body or health shall be null and void.

6:527. §
[The way of compensation]

(1) The tortfeasor shall provide compensation in money, or in kind, if that is more reasonable under the given circumstances.

(2) In order to compensate regular future damage the court is entitled to establish annuity to be paid regularly in advance.

(3) To determine the method of compensation the court is not obliged to comply with the petitions of the injured party but shall not apply any method opposed by all parties.

6:528. §
[Annuity supplementing income]

(1) A person whose capacity to work has been reduced as a result of an accident shall have the right to claim an annuity if his in-

come is less after the damage for reasons beyond his control.

(2) In order to establish the annuity supplementing income the court shall take into account the reduction of capacity for work and the extent of the loss of income.

(3) The loss of earnings (income) of the injured party shall be established by the monthly average income of the previous year. If there was a permanent change in income in this year, the average income after the change shall be taken into account.

(4) If the loss of earnings (income) cannot be established under provisions of (3), the monthly average income of persons pursuing the same or similar activities shall be taken into account.

(5) To establish the loss of income, any change in the future that may be expected shall be taken into account.

(6) To establish the loss of income, the income achieved by the employee with extraordinary work performance despite the reduction of capacity for work shall not be taken into account.

6:529. §
[Annuity complementing support]

(1) In the case of death resulting from the injury the annuity complementing support shall be paid to the dependant of the deceased person. The annuity complementing support shall be paid by the tortfeasor even if this consequence of his conduct was not foreseeable.

(2) The tortfeasor is obliged to pay annuity complementing support even if the deceased person did not pay the support by breaching the relating provisions, or the petitioner did not enforce his claim for an equitable reason.

(3) To establish the extent of the annuity complementing support, the lost support and the income of the petitioner shall be taken into account.

(4) If the adequate income is not in the possession of the petitioner for wrongful reason, furthermore, if he is entitled to enforce claims against others who are in the same position in support, this shall be taken into account to establish the extent of annuity.

(5) In further cases, to establish the annuity the provisions on establishing annuity supplementing income shall be taken into account.

6:530. §
[Modification or termination of annuity]

When the circumstances to be taken into account in the course of establishing the annuity change significantly, any party is entitled to claim the amendment of the amount and duration of the annuity or the termination of the obligation for paying annuity.

6:531. §
[Lump sum damages]

If the extent of damage cannot be established, the compensation provided by the tortfeasor shall be sufficient to compensate the injured party.

6:532. §
[Due date of damages]

Damages are due immediately from the date of the occurrence of damage.

6:533. §
[Limitation]

(1) The provisions of limitation shall be applied to damages with the exception that the claim for compensation in case of damage caused by crime shall not expire after five years as long as the crime is subject to penalty.

(2) The term of limitation for the whole claim for an annuity begins when the damage on which the claim is based occurs for the first time.

6:534. §
[Change of standards of living determining the extent of damage]

(1) If there is a significant change in standards of living between the date of causing damage and the date of passing the judgement, the court is entitled to establish the extent of damages on the basis of the latest

living circumstances. In that case the tortfeasor is obliged to pay late interest from the date the value of damages is settled.

(2) If the injured party wrongfully delays enforcing his claim of indemnification, he bears the risk of price and value changes.

XXVII. Title
Special Forms of Liability

Ch. LXVIII.

Liability for Extra-Hazardous Activities

6:535. §

[Liability for extra-hazardous activity]

(1) The operator of an extra-hazardous activity shall be obliged to compensate loss resulting from it. He shall be relieved of liability by proving that the loss was due to an unavoidable cause that fell outside the scope of his activity.

(2) The provisions of extra-hazardous activity shall be applied to those who endanger human environment and cause damage with their conduct.

(3) Any exclusion or limitation of liability for extra-hazardous activities is null and void; this restriction does not apply to damage to things.

6:536. §

[The operator]

(1) The person, in whose interest the activity is carried out, shall be deemed operator of the extra-hazardous activity.

(2) If there are more operators of the extra-hazardous activity, they shall be qualified as multiple tortfeasors.

6:537. §

[Rules for the contribution of the injured party]

(1) The operator is not obliged to compensate damage resulting from the contributory negligence of the victim. When sharing the damage, the extra-hazardous quality shall be taken into account to the detriment of the operator.

(2) If a person, who is not capable of foreseeing the consequences of his conduct, contributes in causing damage, the operator is liable for this person. The operator shall be entitled to enforce a claim for reimbursement against the supervisor of the person mentioned above at (1).

6:538. §

[Limitation]

The term of limitation for damages arising from extra-hazardous activity shall be three years.

6:539. §

[Collision of extra-hazardous activities and the operators as multiple tortfeasors]

(1) If the damage was caused by extra-hazardous activities of two or more persons, they shall compensate the damage caused in proportion to the extent of their wrongful conduct. If the operator is not the actual tortfeasor, the operator is obliged to pay damages on the basis of the wrongful conduct of the actual tortfeasor.

(2) If neither of the parties is liable based on fault, however, but the cause of the damage lies within the scope of one of the parties' extra-hazardous activity, this party shall compensate the damage.

(3) If the cause of the damage caused to each other lies within both parties' scope of

activity or within neither of them, the parties – in the absence of wrongfulness – shall bear their own damage.

(4) The provisions of this § shall be applied in relations among the operators when more extra-hazardous activities cause damage together with the exception, that in the absence of wrongful conduct and disorder within their scope of activity, they are obliged to pay damages in equal proportion.

Ch. LXIX.

Liability for Damage Caused by Other Persons

6:540. §

[Liability for damage caused by employees and members of legal entities]

(1) If an employee causes damage to a third party in the course of his employment, his employer shall be liable to the victim.

(2) If a member of a legal entity causes damage to a third party in connection with his membership, the legal entity shall be liable to the injured party.

(3) The employee and the member are jointly and severally liable with the employer and the legal entity, if the damage arises from deliberateness.

6:541. §

[Liability for damage caused by the executive officer of the legal entity]

When the executive officer of the legal entity causes damage to a third party in connection with his legal relation, the executive officer and the legal entity are jointly and severally liable (towards the injured party.)

6:542. §

[Liability for damage caused by the agent]

(1) A principal shall be jointly and severally liable with his agent for any damage caused to a third party by the agent in such capacity. The principal shall be relieved of liability if he proves that he was not negligent in choosing, instructing, and supervising the agent.

(2) In case of long-term agency the injured party may enforce his claim of indemnification on the basis of the provisions of damage caused by employees.

6:543. §

[Liability for damage caused by the obligor of the other contract]

The obligee of another contract is liable for damage caused by the obligor being in legal relations with him during his performance, unless the obligee names the tortfeasor.

Ch. LXX.

Liability for Damage Caused by Persons Who Lack Mental Capacity or Have Limited Mental Capacity

6:544. §

[Liability for damage caused by a person who is not capable of foreseeing the consequences of his conduct]

(1) A person who is mentally distracted to the extent that he is not capable of foreseeing the consequences of his conduct shall not be liable for damage caused by him.

(2) Instead of the tortfeasor, his guardian according to the law shall be liable. The supervisor qualifies as guardian if he was supervising the tortfeasor during the causing of the damage.

(3) The guardian shall be relieved of liability if he proves that he was not negligent in nursing or supervising.

(4) For the liability of more than one guardians, the provisions of multiple tortfeasors shall be applied.

6:545. §

[Indemnification on the basis of equity]

If the tortfeasor does not have a guardian or the liability of the guardian cannot be established, exceptionally the tortfeasor may be obliged to completely or partly compensate the caused damage, if that is reasonable in the given circumstances and according to the financial capacity of the parties.

6:546. §
[Own fault]

The tortfeasor cannot refer to his mental distraction if this condition was caused by his own wrongful conduct.

6:547. §
[Liability for minor who is capable of foreseeing the consequences of his conduct]

If the damage is caused by a minor who is capable of foreseeing the consequences of his conduct, the minor and his guardian obliged to supervise him are jointly and severally liable for damage caused by the minor if the injured party proves that the guardian breached his obligation towards the minor wrongfully.

Ch. LXXI.

Liability for Damage Caused by Exercising Public Authority

6:548. §
[Liability for damage caused within the course of exercising public administrative authority]

(1) Liability for damage caused within the course of public administrative authority shall be established only if the damage was caused by act or omission of the public authority and the damage could not be relieved by ordinary legal remedies and by judicial review of the administrative decision.

(2) The legal entity exercising public administrative authority is liable for damage caused within the course of public adminis-tration. If the person exercising public administrative authority is not a legal entity, the supervising legal entity shall be liable for damage caused by the acts of the public authority.

6:549. §
[Liability for damage caused within the authority of court, notary, public prosecutor and public enforcement]

(1) For damage caused within the authority of court and public prosecutor, the provisions on causing damage within the course of exercising public administrative authority shall be properly applied with the distinction that the claim for indemnification shall be enforced against the court or the supreme prosecutor. If the court that caused the damage is not a legal entity, the claim shall be enforced against a court that has legal personality and works in the area of the court that caused the damage. The precondition for such claim is an unsuccessful previous ordinary remedy.

(2) For damage caused within the authority of notary and public enforcement, the provisions on causing damage within the course of exercising public administrative authority shall be properly applied. The precondition for such claim is an unsuccessful previous ordinary remedy.

Ch. LXXII.

Liability for Defective Products

6:550. §
[Liability for damage caused by a defective product]

The producer shall be liable for damage caused by a defect in his product.

6:551. §
[The product]

Product means all movables, even though incorporated into another movable or into an immovable.

6:552. §
[Damage caused by a defective product]

Damage caused by a defective product means

a) damage arising from death, personal injury or injury to health caused by the defective product; furthermore

b) damage to any item of property other than the defective product itself; provided that the amount of the loss exceeds 500 EUR converted to HUF – according to the official rate of exchange of the Hungarian National Bank – at the time the damage occurred, if the

damaged property is of a type ordinarily intended for private use or consumption, and was used by the injured person mainly for his own private use or consumption.

6:553. §
[The producer]

(1) For the purpose of this Chapter producer means the manufacturer of a finished product, the manufacturer of a component part or any raw material and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.

(2) Any person who imports products into the European Economic Area for sale or any economic purpose shall be deemed to be a producer. This rule shall not influence the importer's recourse claim for indemnification against the producer.

(3) Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer, until the supplier informs the injured person of the identity of the producer or the person who supplied him with the product. The same shall apply, in the case of an imported product, if the product does not indicate the identity of the importer, even if the name of the producer is indicated.

(4) From the time the injured person claimed the identification of the producer in written form, the supplier can make his statement in thirty days.

6:554. §
[Defect of the product]

(1) A product is defective when it does not provide the safety which a person is entitled to expect, taking into account the function of the product, the use to which it could reasonably be expected that the product would be put, the presentation concerning the product, the time when the product was put into circulation, and the state of scientific and technical knowledge.

(2) A product shall not be considered defective for the sole reason that a safer product is subsequently put into circulation.

(3) The injured person shall be required to prove the defect of the product.

6:555. §
[Release from liability]

(1) The producer shall not be liable, if he proves that

a) he did not put the product into circulation;

b) the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business;

c) the defect did not exist at the time when the product was put into circulation by him and the cause of the defect came into being afterwards;

d) the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered; or

e) the defect of the product is due to the application of law or other mandatory regulations issued by the public authorities.

(2) The manufacturer of a component part or any raw material shall not be liable, if he proves, that

a) the defect is attributable to the construction or composition of the finished product in which the component has been fitted; or

b) the defect is attributable to the instructions given by the manufacturer of the finished product.

(3) The producer shall not be released from liability even referring to Subsection (1) *d)* if the damage was caused by a pharmaceutical product used according to its instructions.

6:556. §
[Contribution of a third party]

The producer shall not be released from liability even if the damage was caused both by a defect in the product and by the act or omission of a third party. This rule shall not influence the importer's claim for indemnification against the third party.

6:557. §
[Limitation and exclusion of liability]

The limitation or exclusion of the producer's liability to the injured person shall be considered null and void.

6:558. §
[Limitation of the period to claim damages]

(1) The limitation period for claims arising from damage caused by defective product shall be three years.

(2) The limitation period shall begin on the day on which the injured person became aware or should have become aware of the occurrence of the damage, the defect of the product and the identity of the producer.

(3) The producer shall be liable according to the regulation of this Chapter for ten years from the time he put the product into circulation. After that time the injured person may not bring a claim against the producer.

6:559. §
[Miscellaneous provisions]

(1) When applying the rules of this Chapter there is no possibility to lower the amount of damages compared to the whole amount of damages even under special and equitable circumstances.

(2) The rules of this Chapter shall not apply for damage defined by the Act on Nuclear Energy or damage arising from nuclear accidents covered by international conventions ratified by Hungary.

Ch. LXXIII.
Liability for Buildings

6:560. §
[Liability of the owner of building]

(1) The owner of the building shall be liable for damage caused by the falling of parts of the building or the deficiency of the building. He shall be relieved of liability if he is able to prove that the rules of construction and maintenance have not been breached and that he has not acted wrongfully during construction or maintenance in order to prevent the damage.

(2) The provisions of Subsection 1 shall be applied for damage caused by the falling of objects installed on the exterior of a building with the distinction that the person in whose interest the object has been installed is jointly and severally liable with the owner of the building.

(3) These provisions shall not affect the right of the liable party to indemnification from the tortfeasor.

6:561. §
[Liability for damage caused by thrown, dropped or spilled objects]

(1) For damage caused by thrown, dropped or spilled objects from apartments or other places, the tenant or other user of the apartment or other places shall be liable towards the injured party.

(2) The tenant or the user is liable as a guarantor, if he names the tortfeasor. The tenant or the user shall be relieved of obligation if he proves that the tortfeasor's presence in the place was unlawful.

(3) For damage caused by any thrown, dropped or spilled object from a place of building for common use, the owner of the building shall be liable towards the injured party. If the owner names the tortfeasor he shall be liable as a guarantor.

(4) Besides these provisions, the liable person is entitled to enforce indemnification

claims against other persons liable for the damage.

Ch. LXXIV.

Liability for Damages Caused by Animals

6:562. §
[Damage caused by animals]

(1) A person who keeps animals is liable for damage caused by the animals unless he proves that while keeping the animals his conduct was not wrongful.

(2) The provisions of liability for extra-hazardous activities shall be applied to keepers of dangerous animals.

6:563. §
[Liability for damage caused by game]

(1) To compensate the damage caused by game, the owner of the hunting rights on whose territory the damage occurred is liable. If the damage did not occur on hunting territory, the owner of the right of hunt from whose territory the game came from is liable.

(2) The owner of the hunting rights shall be relieved of obligation if he proves that the damage was caused by an unavoidable cause outside of his control.

(3) The term of limitation shall be three years.

XXVIII. Title

Indemnification for Lawfully Caused Damage

6:564. §
[Indemnification for lawfully caused damage]

When the law prescribes paying compensation for damage caused by lawful act, the provisions for damages shall be properly applied for the method and extent of indemnification.

England and Commonwealth

Ken Oliphant

Basic Questions of Tort Law from the Perspective of England and the Commonwealth

Chapter 5

Basic Questions of Tort Law from the Perspective of England and the Commonwealth

Ken Oliphant

Preliminary Remarks

I. General introduction

The aim of this chapter is to provide an English and (within limits) Commonwealth perspective on the fundamental ideas elaborated in *Helmut Koziol's* »Basic Questions of Tort Law from a Germanic Perspective«. That book is so rich in its argumentation that the selection of particular ideas within it as »fundamental« runs the risk of omitting others that are no less or perhaps even more important. But the task I was set requires me to grasp the nettle, though I would observe by way of mitigation that the ideas I have chosen to highlight struck me as especially likely to resonate with English and Commonwealth lawyers. **5/1**

II. The fundamental ideas in the »Basic Questions«

Formulated in my own words, the fundamental ideas to be found in the »Basic Questions« are the following: **5/2**

1. The law of tort[1] should be seen as part of a comprehensive system that secures the protection of »legal goods«. This system includes not merely the various divisions of private law (tort, contract, unjust enrichment, etc) but also various mechanisms of a public law character, including criminal law and social security law.
2. This overall system of protective mechanisms should be *consistent* in the following respects[2]: it should be based on a coherent and transparent set of values; each constituent mechanism should play a role appropriate to its place in the system; it should be recognised that the various mechanisms have different functions and are governed by different basic principles, and they should not be twisted to perform foreign functions or to embrace alien principles; and there should be proportionality between the factors generating legal consequences and the consequences they generate (»more serious legal consequences call for stricter prerequisites«)[3].
3. A fundamental difference exists between the protective mechanisms provided by private law and those provided by public law. The former should not be given public law tasks that are foreign to their nature. Private law is distinctive in being based on a structural principle of *bilateral justification* that requires a coincidence between the reasons for placing an obligation on one party and those underpinning the corresponding entitlement in the other. The principles of private law cannot be justified by reference merely to »one-sided« considerations[4].
4. The law best performs its functions when it is constructed as a flexible system that recognises the divergent value of different goods and eschews clear-cut boundaries in favour of fluid transitions[5].

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1 It is convenient to use this terminology notwithstanding the inexact fit between the English term »tort law« and the German »Schadenersatzrecht«. See Basic Questions I, v. Where necessary, the text below will speak of »the law of damages« if this more accurately conveys the subject-matter addressed.

2 See generally Basic Questions I, no 2/90 ff.

3 Basic Questions I, no 2/95.

4 Basic Questions I, no 2/92.

5 Basic Questions I, nos 1/17 ff and 2/98.

III. Their application to English and Commonwealth law

These propositions set out a basic approach to tort law that would strike most English and Commonwealth lawyers as somewhat familiar, and would be enthusiastically endorsed by some – though emphatically denounced by others. It would be helpful at the beginning of this contribution to provide a preliminary indication of where – in England and the Commonwealth – the principal battlegrounds would be seen to lie. **5/3**

Tort as part of a comprehensive system for the protection of legal goods. Though I cannot now think of any account of tortious liability that subjects to such sustained and rigorous analysis its place in the overall system for the protection of legal goods, I suspect that most English and Commonwealth lawyers would accept that it is helpful to view it in those terms, and one sees debates in particular contexts that set tort law against other protective mechanisms, including those of public law (eg tort versus regulation, tort versus »no fault«). **5/4**

The consistency of the overall system. Though there are a few »critical« legal scholars who celebrate inconsistency in the law[6], a substantial majority of English and Commonwealth lawyers would accept the desirability of what is often termed »coherence«. In recent decades, coherence in tort law has been a particular theme of the writings of the Canadian legal scholar *Ernest Weinrib* and those who might loosely be called his disciples[7]. However, even those who accept in principle that the law should be coherent in the senses described sometimes recognise restraints on what can be done to achieve it in a common law system: certain reforms may be considered to lie beyond the legitimate role of the judiciary and to be appropriate only for the legislator. As the legislator rarely finds political advantage in legislating in the field of tort law – and, when it does, cannot be relied upon to enact a coherent reform – this becomes a source of considerable frustration within the legal community. **5/5**

The distinctiveness of private law. Weinrib has also argued extensively in his writings that private law is distinctive because of its bilateral structure, and cannot therefore coherently pursue »public« goals. These should be pursued, if at all, through alternative legal mechanisms. This view is also endorsed by others who nevertheless stop short of »buying into« the whole *Weinrib* package. However, **5/6**

6 See also the theory of »complementarity« developed by *I. Englard*: *idem*, The Philosophy of Tort Law (1992); *idem*, The Idea of Complementarity as a Philosophical Basis for Pluralism in Tort Law, in: D.G. Owen (ed), The Philosophy of Tort Law (1997).

7 As to *E. Weinrib*, see especially *idem*, The Idea of Private Law (revised edn, 2012); *idem*, Corrective Justice (2012). As to his »disciples«, see eg *A. Beever*, Rediscovering the Law of Negligence (2007); *J.W. Neyers*, A Theory of Vicarious Liability (2005) 43 Alberta Law Review 287; *J.W. Neyers*, The Economic Torts as Corrective Justice (2009) 17 Torts Law Journal (TLJ) 162.

there is also a substantial body of opinion that holds that instrumental goals are legitimately pursued through private law. It is routine, for example, for policy considerations to be taken into account in deciding whether, in a particular situation, a duty of care is owed by one person to another. Most of those who believe that this is legitimate would strenuously deny that they are conflating private law with public law.

5/7 *Flexibility versus certainty.* On this point, there is likely to be more resistance to the thesis elaborated in »Basic Questions«. Since probably time immemorial, there has been a tension in the law between flexibility and certainty, and the nature of common law systems – where the judge is the prime mover of legal development, not the legislator – has meant that judges attach particular importance to certainty as they create, apply and develop »case law«. The doctrine of precedent (stare decisis) is perhaps the most obvious product of this philosophy. But it has also been a particularly visible feature of the judicial development of the principles of tort law, in which it has often (too often?) been accepted that a measure of arbitrariness is the necessary price of an overriding commitment to certainty.

Part 1 Introduction

I. Ownership and shifting of risk

A basic implication of the ideas stated above provides *Koziol's* point of departure in »Basic Questions«: »If someone suffers damage, then in principle he must bear this damage himself«[8]. This, following *Claus-Wilhelm Canaris*, is (»self-evidently«) a »general risk of life«. From the perspective of private law, the conclusion seems to follow from the principle of bilateral justification because the mere suffering of loss by one person provides no reason in itself to oblige another person to bear its cost. Shifting the risk to someone else requires an independent justification directed at that other person. This attitude is encapsulated in the Latin maxim *casum sentit dominus* that *Koziol* cites in his opening sentence. **5/8**

Probably all legal systems take this as their starting point. The Latin phrase itself is perhaps not so familiar in English – a search of the Westlaw database of UK cases produced no hits at all – but, as *Koziol* notes, there is a well-known English equivalent: let the loss lie where it falls. This seems to be explicitly cited more often in connection with contracts than torts[9], but it clearly has currency in the latter context too. The great American judge and jurist *Oliver Wendell Holmes* observed in his magnum opus »The Common Law« that »[t]he general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune«[10]. A more recent dictum teases out the idea a little further: »The starting point must be that prima facie a loss must lie where it falls. Sound and cogent reasons must be demonstrated for the common law to intervene by decreeing that the loss is to be borne by another person. And judges must take into account the fact that in a practical world the common law cannot spread its protection too widely.«[11] **5/9**

8 Basic Questions I, no 1/1.

9 Especially in connection with supervening events rendering performance of the contract impossible: see eg *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] Law Reports, Appeal Cases (AC) 32.

10 *O.W. Holmes*, The Common Law (1881, republished 1991) 94.

11 *White v. Jones* [1995] 2 AC 205, 236 per Steyn LJ (CA). See also *Stovin v. Wise* [1996] AC 923, 933 per Lord Nicholls (»Leaving the loss to lie where it falls is not always an acceptable outcome«) and, in the context of ship collisions, *Cayzer, Irvine & Co. (Owners of the Steamship »Clan Sinclair«) v. Carron Co. (Owners of the Steamship »Margaret«)* (1884) 9 Law Reports, Appeal Cases (Second Series) (App Cas) 873, 881 per Lord Blackburn.

5/10 Broadly the same notion is encapsulated in a Latin phrase that does have broad currency in the common law world: *damnum absque iniuria*[12]. This expresses the idea that not all damage constitutes an injury for which the law will hold another person accountable. See further no 5/117 ff below.

5/11 Needless to say, English lawyers are also familiar with the »land of milk and honey« delusions that *Koziol* bemoans in his opening pages[13]. Thus, one senior judge expressly criticised the tendency to assume »that for every mischance in an accident-prone world someone solvent must be liable in damages«[14]. And, in similar vein, the courts have been urged »not [to] contribute to the creation of a society bent on litigation, which is premised on the illusion that for every misfortune there is a remedy«[15]. In judicial dicta and the general public discourse there has been considerable emphasis on the adverse effects for society of what is popularly derided as a »compensation culture«. Encapsulating such concerns, it has been said that »[t]he fear is that, instead of learning to cope with the inevitable irritations and misfortunes of life, people will look to others to compensate them for all their woes, and those others will then become unduly defensive or protective«[16]. At the same time, anxiety has been expressed at the restrictions on personal autonomy that result from the over-extension of tort law, not just but also for potential victims, whose choices of action may be limited if those facing the threat of liability respond in a detrimentally defensive fashion.

5/12 These various concerns have produced substantial legislative reform of tort law in Australia[17], inspired by the tort reform movement in the USA, as well as a rather cosmetic statutory reform in the UK[18]. The need for such reforms has attracted general academic scepticism[19], though not because academics believe that

12 See eg *Halsbury's Laws of England*, vol 97, Tort, § 412 ff (*K. Oliphant*).

13 Basic Questions I, no 1/2.

14 *CBS Songs Ltd. v. Amstrad Consumer Electronics plc* [1988] AC 1013, 1059 per Lord Templeman.

15 *Gorringe v. Calderdale Metropolitan Borough Council* [2004] 1 Weekly Law Reports (WLR) 1057 at [2] per Lord Stein.

16 *Majrowski v. Guy's and St Thomas's NHS Trust* [2007] 1 AC 224 at [69], per Baroness Hale.

17 Following the »Ipp Report« of 2002: Review of the Law of Negligence: Final Report, 2002, <www.revofneg.treasury.gov.au/content/Report2/PDF/Law_Neg_Final.pdf>.

18 Compensation Act 2006. Reforms of the funding regime for civil litigation that came into effect in April 2013 are attributable to the same concerns but are likely to have a greater impact.

19 In the UK: see *K. Williams*, State of Fear: Britain's »Compensation Culture« Reviewed (2005) 25 Legal Studies (LS) 499; *R. Lewis/A. Morris/K. Oliphant*, Tort Personal Injury Claims Statistics: Is There a Compensation Culture in the United Kingdom? (2006) 14 TLJ 158; *A. Morris*, Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury (2007) 70 Modern Law Review (MLR) 349; see generally *Better Regulation Task Force*, Better Routes to Redress (2004). In Australia: see *E.W. Wright*, National Trends in Personal Injury Litigation: Before and After »Ipp« (2006) 14 TLJ 233; *D. Ipp JA*, Themes in the Law of Tort (2007) 81 Australian Law Journal (ALJ) 609; *J.F. Keeler*, Personal Responsibility and the Reforms Recommended by the Ipp Report: »Time Future Contained

the law should compensate for every loss that is suffered; rather, there is a widely-shared perception that the public hostility directed towards the tort system can result in reforms that deform fundamental principles of justice and prevent the payment of compensation to injured persons even where there are good reasons for holding another person liable for it.

II. Tort law's place in the overall system

More fundamentally, there has long been scepticism that tort law is able to meet the various demands that modern society places on it, and this has led to the introduction of various alternative mechanisms in an effort to address societal needs better, sometimes curtailing remedies that would otherwise be available under the law of tort[20]. **5/13**

A. Workers' compensation[21]

No-fault workers' compensation was introduced in Britain by the Workmen's Compensation Act 1897, and the example was soon followed in New Zealand and South Australia (1900), with other Australian states and territories following afterwards. The first Canadian province to introduce workers' compensation was Ontario in 1915, and all the major provinces had it by 1931. The relationship of the new schemes with existing private law remedies took different forms. In the United Kingdom, the Workmen's Compensation Act placed no limits on the worker's right to litigate in tort. It was still possible to sue the employer for a work-related injury and recover damages in the law of tort. By contrast, tort claims against the employer were abolished in Australia in some states, retained with restricted access in others, and retained with unlimited access in a final group of states. Restrictions on the right to sue in tort have taken various forms, including caps on the damages recoverable and minimum thresholds, expressed either in financial or percentage-disability terms, with the restrictions applying either to the whole claim or specifically to economic or non-economic losses. Depending on time and **5/14**

in Time Past« (2006) 14 TLJ 48; *B. McDonald*, The Impact of the Civil Liability Legislation on Fundamental Policies and Principles on the Common Law of Negligence (2006) 14 TLJ 268.

20 For an overview, see *K. Oliphant*, Landmarks of No-Fault in the Common Law, in: W. van Boom/M. Faure (eds), Shifts in Compensation between Private and Public Systems (2007).

21 *Oliphant* in: van Boom/Faure, Shifts in Compensation no 5 ff; *R. Lewis*, Employers' Liability and Workers' Compensation: England and Wales, in: K. Oliphant/G. Wagner (eds), Employers' Liability and Workers' Compensation (2012).

place, the injured person might be required to make an irrevocable election to pursue one claim rather than the other, with a decision to sue in tort entailing the loss of workers' compensation rights, or could be allowed to pursue both concurrently until the actual award of damages in tort.

5/15 Workers' compensation no longer maintains a distinct institutional identity in Britain or New Zealand – in contrast with Australia and Canada. In Britain, workers' compensation was subsumed within general social welfare provision in the immediate post-war years, becoming the Industrial Injuries Scheme (IIS)[22]. IIS is very much a watered-down form of workers' compensation, with benefits paid at fixed rates rather than related to actual pre-accident earnings. By 1990 (when the link with pre-accident earnings was broken) IIS had been substantially integrated into the ordinary social security system, though the benefits paid are distinct from those paid in respect of non-work-related ill-health.

5/16 In New Zealand, workers' compensation was superseded by the comprehensive Accident Compensation Scheme that was established in 1974. See no 5/22 ff below.

B. Social welfare provision

5/17 The British social welfare system was introduced in the years following the Second World War. It offers a variety of forms of social security – including sick pay, incapacity benefit and unemployment benefit – as well as free access to the National Health Service (NHS) for all. Initially, there was only incomplete deduction of the value of social security benefits from tort damages recovered in respect of the same injury, meaning that there was an element of double compensation in the sums received by the claimant, but since 1989 a statutory recoupment regime has applied, allowing the State to »claw back« the value of social security benefits paid in respect of the same injury. This operates by way of a deduction from the damages paid to the claimant rather than as an independent recourse action against the defendant[23]. The deduction is made only from heads of damage corresponding to the loss compensated by the social security benefit, which means that damages for pain and suffering – for which there is no corresponding social security benefit – are effectively ring-fenced. For a long time, there was only very limited provision for the recoupment of NHS costs in treating the injured person, but from 2007 the statutory recoupment scheme was extended to allow the Depart-

22 National Insurance (Industrial Injuries) Act 1946. See generally *R. Lewis*, Compensation for Industrial Injury: A Guide to the Revised Scheme of Benefits for Work Accidents and Diseases (1987).

23 See now Social Security (Recovery of Benefits) Act 1997.

ment of Health to recover the relevant NHS charges (including the charge for the provision of ambulance services)[24].

Some scholars believe that the social security system constitutes a better basis for the compensation of personal injuries than tort law, and recommend that the tort claims should be curtailed to allow exclusive reliance on social security[25], but the value of social security benefits are much too low at present to allow one to conclude that this would be an adequate trade-off, and there is no public enthusiasm for the tax rises that would be necessary to support higher levels of benefit. **5/18**

C. Targeted no-fault

As neither tort law nor social security appeared to offer an adequate response to the social problem of accidental injury, the focus of reform efforts shifted to the introduction of insurance-based no-fault compensation schemes in particular areas. In the UK, the main example is criminal injuries compensation, which was first introduced in 1964[26]. Until 2001, awards were assessed in accordance with the rules of assessment for common law damages, but since then there has been a statutory »tariff« of 25 different levels of compensation, the maximum tariff payable being £ 250,000. Loss of earnings (beyond the first 28 weeks) and »special expenses« may also be compensated under the scheme; until 2012, the rules for calculating these awards are similar to though less generous than those at common law, but since 2012 loss of earnings has been compensated on a flat-rate basis at a level equivalent to social security benefit (statutory sick pay). The maximum total amount payable in respect of a single injury is £ 500,000[27]. Though it has been suggested that the creation of a State fund was justified on grounds of the State's responsibility for failing to protect its citizens against crime, combined with its curtailment of individual rights of self-protection, these arguments were labelled »fallacious and dangerous« by the working party whose report paved the way for the scheme's introduction[28]. Its justification for the reform was simply sympathy for the victim, coupled with recognition of the inadequacy of benefits provided by the social security system. **5/19**

24 Health and Social Care (Community Health and Standards) Act 2003; Health and Social Care (Community Health and Standards) Act 2003 (Commencement) (No 11) Order 2006.

25 See eg *J. Smillie*, The Future of Negligence (2007) 15 TLJ 300.

26 Criminal injuries compensation was introduced in New Zealand in 1964, slightly ahead of the United Kingdom, and subsequently in Australia and Canada.

27 See *Ministry of Justice*, The Criminal Injuries Compensation Scheme 2012 (2012).

28 *Home Office Working Party on Compensation for Victims of Crimes of Violence,* Compensation for Victims of Crimes of Violence, Report, Cmnd 1406 (1961); and see generally *Oliphant* in: van Boom/Faure, Shifts in Compensation no 36 ff.

5/20 It has also been proposed that the UK should create a special no-fault compensation scheme for personal injuries caused by road traffic accidents, but no legislation with that effect has been forthcoming. In Canada, by contrast, the first no-fault automobile accident scheme was introduced in Saskatchewan in 1946, followed some time later in certain other provinces[29]. Some Australian states have also introduced auto no-fault[30].

5/21 No-fault compensation for medical injuries has also been proposed from time to time, but also without tangible result. For example, a Department of Health consultation paper in 2003 found that there was a case for no-fault compensation to be paid in respect of birth injuries resulting in severe neurological impairment[31], but this was not taken up in the subsequent Act that implemented other recommendations from the consultation paper[32].

D. Universal no-fault

5/22 A possible model for a more thorough-going reform is provided by New Zealand's no-fault accident compensation scheme, introduced in 1974. This implemented the proposals of an iconic official report by the judge *Sir Owen Woodhouse*[33]. *Woodhouse* found that »[t]he negligence action is a form of lottery« and criticised the overall compensation system – also including workers' compensation and social security – of which it was part: »Such a fragmented and capricious response to a social problem which cries out for co-ordinated and comprehensive treatment cannot be good enough.«[34] The report proposed »two fundamental principles«: »First, no satisfactory system of injury insurance can be organised except on a basis of community responsibility; Second, wisdom, logic, and justice all require that every citizen who is injured must be included, and equal losses must be given equal treatment. There must be comprehensive entitlement«[35].

Further aspects of the framework proposed were a commitment to complete rehabilitation and real (though not »full«) compensation, and recognition of the need for administrative efficiency.

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29 *Oliphant* in: van Boom/Faure, Shifts in Compensation nos 22 and 32 ff.
30 *Oliphant* in: van Boom/Faure, Shifts in Compensation no 70.
31 *Chief Medical Officer,* Making Amends: A consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS (Department of Health, 2003).
32 NHS Redress Act 2006.
33 *Royal Commission of Inquiry (Chairman: The Honourable Mr Justice Woodhouse),* Compensation for Personal Injury in New Zealand (1967) *[Woodhouse Report].*
34 Ibidem § 1.
35 Ibidem § 1.

The Accident Compensation Scheme came into operation in 1974, enacting the majority of the *Woodhouse* proposals. Its basic components may be summarised as follows[36]: **5/23**

- Cover under the scheme attaches to various specified categories of personal injury, including personal injury caused by an accident, work-related diseases, infections and processes, and medical treatment injuries. It is immaterial whether the injury was caused by another person's fault. There are specific exclusions from the scheme in respect of illnesses and infections – except if work-related, or the result of treatment injury – and the consequences of ageing.
- The compensation provided is »real« but not »full«. It covers both economic and non-economic losses, and includes, where appropriate, weekly compensation, paid at 80 % of pre-accident earnings, up to a fixed maximum of approximately 2.5 times average weekly income for those in paid employment, lump-sum compensation for non-economic loss, paid in respect of permanent impairment assessed at 10 % or greater, at levels ranging between $ 2,500 and $ 100,000, and medical and rehabilitation expenses, including public healthcare fees and expenses such as the cost of home or vehicle adjustments, care assistance in the home, and the provision of a wheelchair.
- The scheme is funded by levies on employers, the self-employed, motor vehicle licence-holders, and, since 1992, by employees (»earners«) too. A proportion of excise on petrol is also applied to the scheme, and there is additionally a measure of public subvention from general taxation.
- Where cover exists under the scheme, civil litigation for compensatory damages in respect of the same injury is barred.

A brochure published in 2004 to mark 30 years of the scheme described it as »[t]he most rational and the most humane compensation law in the world«[37]. Notwithstanding occasional grumblings about its operation in certain contexts, the scheme's basic principles have a large measure of support within the country[38]. Nevertheless, a number of (mainly foreign) scholars have subjected it to criticism[39]. First, it is argued that it is unfair to limit the compensation paid to those injured by fault below the levels that would be awarded in a successful civil action for compensatory damages[40]. Corrective justice, it is said, requires full compensa- **5/24**

36 *Oliphant* in: van Boom/Faure, Shifts in Compensation no 60 ff.

37 *Accident Compensation Corporation,* Thirty Years of Kiwis Helping Kiwis, 1974-2004 (2004) 3.

38 *G. Wilson,* ACC and Community Responsibility (2004) 35 Victoria University of Wellington Law Review (VUWLR) 969, 970.

39 For an overview of criticisms, see *J. Henderson*, The New Zealand Accident Compensation Reform (1981) 48 University of Chicago Law Review (U Chi L Rev) 781.

40 See eg *R. Mahoney*, New Zealand's Accident Compensation Scheme: A Reassessment (1992) American Journal of Comparative Law (Am J Comp L) 159.

tion for losses attributable to the wrong. The principle undoubtedly has intuitive appeal, but does the tort system really achieve corrective justice in the imagined sense? To *Woodhouse*, it did not. Legal fault (the failure to attain the standard of the reasonable person) is »a legal fiction«, and certainly does not connote moral culpability[41]. It is, in addition, an insubstantial basis for distinguishing between injury attracting full compensation and injury which left the victim to look for collateral sources of support. The negligence action is, in effect, »a form of lottery«[42]. In any case, the tortfeasor is almost always insulated from the direct cost of liability by insurance. Is it possible, then, to maintain (or restore) previously existing rights of action for victims of fault alongside the no-fault compensation entitlements extended to all suffering accidental personal injury? This has been suggested from time to time by commentators[43], but the New Zealand Law Commission has expressed its scepticism: »[a] supplementary tort liability scheme could duplicate the costs of compensating injury«[44]. In fact, the *Woodhouse* vision was explicitly premised on a costs calculation that the finances devoted to existing compensation systems (tort, workers' compensation and criminal injuries compensation) would be redeployed to the new no-fault scheme.

5/25 A second criticism is that a no-fault compensation scheme cannot deter careless conduct, and, if its introduction is accompanied by the abolition of the deterrent of an action for damages in tort, must inevitably promote an increase in accident rates[45]. The evidence, it has to be said, is inconclusive. That cited in support of the criticism has relied excessively upon anecdote and personal observation[46]. On the other side of the argument, it has been shown that the available statistical evidence gives no reason to believe that the introduction of no-fault has increased accident rates[47]. It must also be remembered that the scheme has had available to

41 *Woodhouse Report* (FN 33) § 88.

42 *Woodhouse Report* (FN 33) § 1.

43 See eg *L. Klar*, New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective [1983] University of Toronto Law Journal (UTLJ) 33; *R. Miller*, The Future of New Zealand's Accident Compensation Scheme (1989) 11 University of Hawaii Law Review (U Hawaii L Rev) 1; *Mahoney* (1992) Am J Comp L 159.

44 *New Zealand Law Commission*, Comment on »The Future of New Zealand's Accident Compensation Scheme« by *R.S. Miller* (1990) 12 U Hawaii L Rev 339, 342.

45 See eg *Mahoney* (1992) Am J Comp L 159; *Miller* (1989) 11 U Hawaii L Rev 1; *B. Howell*, Medical Misadventure and Accident Compensation in New Zealand: An Incentives-Based Analysis (2004) 35 VUWLR 857.

46 See eg *Miller* (1989) 11 U Hawaii L Rev 1, 37-8, whose conclusion that »disgracefully hazardous conditions had become endemic« as a consequence of the ACC reform is backed up by observations he made while visiting New Zealand as an overseas scholar, for example, that rugby players do not wear the helmets or padding used in American football.

47 See generally *New Zealand Law Commission* (1990) 12 U Hawaii L Rev 339. *C. Brown*, Deterrence in Tort and No-Fault: The New Zealand Experience (1985) 73 California Law Review (Cal L Rev) 976, for example, has demonstrated that the predominantly downward trend in road accident casualties that started prior to 1974 continued and even accelerated after that date.

it a number of tools that it can employ to duplicate – at least to some extent – such incentive effect as tort possesses, for example, the experience-rating of levies and the variation of levies following audit of safety management practices[48].

Finally, the no-fault scheme has been criticised as an undue burden on state expenditure and the public at large[49]. It is true that the scheme has on occasion experienced financial difficulties, but these seem to have been attributable not to any intrinsic lack of viability in the fundamental vision, but rather to specific failures in the implementation. **5/26**

Against these criticisms – even if one accepts that they have some validity – must be weighed what may be considered to be the scheme's three principal achievements. First, it extends compensation entitlements beyond the class of those injured by another person's fault, and so makes the receipt of compensation following an accident less of a lottery than it inevitably is under tort (which compensates only a very small minority of accident victims, maybe as few as the 6.5 % estimated by a Royal Commission in the United Kingdom)[50]. Secondly, the resources necessary to achieve this more complete coverage are much more efficiently deployed than they would be in the tort litigation system. While the operating costs of the tort system (in the UK) have been calculated at 85 % of the value of total damages awards[51], the comparable figure under the New Zealand scheme is only 12 % (ie for every dollar paid on compensation or rehabilitation, only 12 cents is paid on overheads)[52]. Lastly, the no-fault scheme explicitly acknowledges community responsibility for both the production of accidental injury and its redress. Accidents are the inevitable by-product of activities which the community encourages, and from which the community as a whole benefits, and so the community bears causal responsibility for their occurrence[53]. **5/27**

48 For the latter, see Accident Compensation Act 2001, sec 175 and Accident Compensation (Employer Levy) Regulations 2004 (SR 2004/23). Experience rating of employers was introduced in 1992 but not restored after a short experiment with privatization in 1999-2000. An earlier system of safety incentive bonuses was abandoned in the 1980s because it could not be shown that it contributed to improved accident prevention.

49 See eg *P.S. Atiyah*, The Damages Lottery (1997) 183-4 (adding that such state schemes also promote an undesirable »blame culture«). In this book, *Atiyah*, previously a proponent of no-fault (see especially his book Accidents, Compensation and the Law, first published in 1969 but now edited by *P. Cane* [7th edn 2006]), declared his preference for first-party insurance as the solution to the social problem of accidental injury.

50 *Royal Commission on Civil Liability and Compensation for Personal Injury* (Chairman: Lord *Pearson*), Report (1978) *[Pearson Report]* vol 1, § 78.

51 *Pearson Report*, vol 1, § 83.

52 *Accident Compensation Corporation*, Annual Report 2005 (2005) 74.

53 See further *R. Gaskins*, Environmental Accidents (1990).

E. Private insurance

5/28 A more radical proposal still is to abolish tortious liability for personal injury – and replace it with *nothing*, leaving private first-party insurance to fill the gap to the extent that individuals desire[54]. It is claimed that this would serve to avoid the excesses and deficiencies of the tort system, while allowing individuals to tailor the cover they purchase to their own needs. Though the main proponent of the idea is hugely respected for his work on compensation and liability for accidents, the proposal has attracted very little support[55].

III. Certainty versus flexibility

5/29 The tension between certainty and flexibility is an enduring feature of tort law in common law, and perhaps all legal systems. Features of the law can be highlighted that illustrate both tendencies. On the one hand, one might mention the general acceptance that the indeterminate scope of a potential liability may be a good reason for denying the existence of a duty of care in a whole category of cases[56], a toleration of »bright line« rules whose effects are to some extent arbitrary[57], a preference for what is pragmatic over what is principled[58], and the not infrequent rejection of innovation in the law on the grounds that it would lead to uncertainty[59]. On the other hand, one sees a more flexible approach in the acceptance of the apportionment of liability where there is contributory negligence[60], the recognition (within limits) of proportional liability in cases of causal uncer-

54 *Atiyah*, The Damages Lottery.

55 For criticism, see *A. Ripstein*, Some Recent Obituaries of Tort Law (1998) 48 UTLJ 561; *J. Conaghan/W. Mansell*, From the Permissive to the Dismissive Society: Patrick Atiyah's Accidents, Compensation and the Market (1998) 25 Journal of Law and Society 284.

56 That is cases falling outside the set of recognised »duty situations«: see Clerk & Lindsell on Torts[20] (2010) § 8.05 ff.

57 For example in the area of liability for psychiatric harm: see eg *Alcock v. Chief Constable of South Yorkshire* [1992] 1 AC 310; *Page v. Smith* [1996] AC 155; *White v. Chief Constable South Yorkshire Police* [1999] 2 AC 455. In the latter case, at 500, Lord Steyn remarked that »the law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify« but lamely concluded that the radical reform required was beyond the capacity of the courts and had to be left to the legislature.

58 *Caparo Industries plc v. Dickman* [1990] 2 AC 605, 618 per Lord Bridge and 628 per Lord Roskill.

59 See eg *D. v. East Berkshire Community Health NHS Trust* [2005] United Kingdom House of Lords (UKHL) 23, [2005] 2 AC 373 at [94] per Lord Nicholls, rejecting a less rigid distinction between issues of duty and breach on the basis that it was »likely to lead to a lengthy and unnecessary period of uncertainty in an important area of the law«.

60 See no 5/139 f below.

tainty[61], the explicit weighing of policy considerations in deciding whether the scope of the duty of care should be extended beyond the limits established in previous cases[62], and in many other specific features of tort law. At a deeper level, one might also say that, by allowing the award of exemplary damages, the common law recognises that there is a fluid transition between tort and criminal law[63]. Of course, this is an issue that has generated excited debate, with powerful contributions on both sides of the argument.

Looking at the broader picture, *Waddams*[64] has mounted a sustained attack **5/30**
on the idea that the complexity of Anglo-American private law can be successfully accommodated within a strictly-demarcated classificatory framework. As he notes, key developments in the law have often occurred when fundamental concepts have operated cumulatively and in such a way as to preclude allocation of the legal issue to a single doctrinal category. However, the »pigeonholing« tendency that writers like *Waddams* criticise probably remains the dominant attitude of the courts.

61 See no 5/108 ff below.

62 Under the third stage of the approach to the duty of care derived from *Caparo Industries plc v. Dickman* [1990] 2 AC 605.

63 See no 5/48 below. Cf Basic Questions I, nos 1/22 f and 2/55 ff.

64 *S. Waddams*, Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning (2003) *[K. Oliphant* in: H. Koziol/B.C. Steininger (eds), European Tort Law 2003 (2004) 113, no 63].

Part 2 The law of damages within the system for the protection of rights and legal interests

I. In general

A. The basic idea

5/31 One of *Koziol's* fundamental ideas is that the law of damages must be seen as part of a comprehensive system for the protection of »legal goods« (rights and legal interests)[65]. The constituent elements of this overall system involve consequences that are more or less onerous for the defendant, and, in the interests of internal consistency, ought to be ordered in such a way that the triggering conditions for each are proportionate to the consequences that flow from them.

B. Applicability of the basic idea to English and Commonwealth law

5/32 It seems to me that this basic idea is intuitively attractive and could well be accepted by common lawyers in the English and Commonwealth legal traditions. One finds also that current law also adopts, at least approximately, the sort of scheme that *Koziol* seems to have in mind – perhaps most obviously in the more stringent conditions of liability applied in criminal law than in civil law, and the former's higher standard of proof (see no 5/52 below). Admittedly, some aspects of *Koziol's* account would strike common lawyers as alien (eg the treatment of injunctions as separate from the liabilities for which, in English law, they would be regarded as remedies), but I do not think that this undermines the basic argument.

5/33 Some short notes about some of the specific protective mechanisms follow.

II. Recovery of property

A. Introductory remarks

5/34 It may be surprising to an external observer that *tort law* is English law's main mechanism for restoring property when possession is lost, and excluding others

65 Basic Questions I, chapter 2.

from it. In the past – prior to development of the land register – it also acted as a mechanism for deciding ownership of property. These propositions apply to both real and personal property, and pari passu to rights in the person.

B. Recovery of land

A possessor may exclude others through the tort of trespass to land and regain possession of it if lost through the action for recovery of land – which is the modern form of the tort of ejectment, itself a form of liability in trespass. The claim is also known as a possession claim, and a streamlined procedure applies[66]. The action protects both title to or estate in the land and possession of it. **5/35**

C. Recovery of chattels

The common law failed to develop distinctively proprietary remedies for the recovery of goods[67]. At common law, damages were the only remedy for conversion, which was a purely personal action and judgment did not entitle the plaintiff to the assistance of the court in recovering possession[68]. The erstwhile »tort of detinue« was different: »A successful action in detinue resulted in a judgment for delivery of the chattel or payment of its value as assessed, and for payment of damages for its detention. This, in effect, gave the defendant an option whether to return the chattel or to pay its value, and if the plaintiff wished to insist on specific restitution of the chattel he had to have recourse to Chancery«[69]. It was only the Common Law Procedure Act 1854, sec 78, that gave the court power to order delivery of the chattel by the defendant without giving him the option to pay its value as assessed. **5/36**

The remedy previously available only in detinue was extended by statute to wrongful detention of all sorts in 1977; at the same time, detinue was abolished as a separate tort and effectively absorbed into an expanded law of conversion. Where goods have been detained in circumstances amounting to a wrongful interference with them contrary to Torts (Interference with Goods) Act 1977, the court may, at its discretion, make an order for delivery of the goods by the defendant **5/37**

66 Civil Procedure Rules 1998, Part 55.

67 *A. Kiralfy*, The Problem of a Law of Property in Goods (1949) 12 MLR 424, 424.

68 *General & Finance Facilities Ltd. v. Cooks Cars (Romford) Ltd.* [1963] 1 WLR 644 at 649 f, per Diplock LJ; *M. Lunney*, Wrongful Interference with Goods, in: K. Oliphant (ed), The Law of Tort² (2007) § 11-102.

69 *General & Finance Facilities Ltd. v. Cooks Cars (Romford) Ltd.* [1963] 1 WLR 644 at 649 f, per Diplock LJ; *Lunney* in: Oliphant, The Law of Tort² § 11-102.

to the claimant[70]. This means that the availability of an order for the delivery of goods is conditional on a liability established in tort (conversion). In this respect, English law may be contrasted with its continental neighbours where the claim for delivery (*vindicatio*) is independent of tortious liability.

5/38 Adopting a tort-based approach to the recovery of chattels has the consequence that a fault-free defendant through whose hands the property has passed, but who no longer has possession of it, may be liable to the claimant for its value as well as any consequential loss. The classic example is *Fowler v. Hollins*[71]. A rogue fraudulently obtained some cotton from Fowler. Hollins, whose ordinary business was that of a cotton broker, bought the cotton from the rogue in the belief that one of his ordinary clients would buy it and subsequently sold the client the cotton; Hollins received only a broker's commission on the sale. Although Hollins had no knowledge of the fraud, he was held liable in conversion. He had made himself a principal on the sale and had transferred the cotton to his client, an act which was inconsistent with the rights of the owner[72]. Because of the harshness of this rule, the courts have been driven to limit or recognise exceptions to the liability so as to protect the fault-free dealer. For example, an auctioneer who accepts goods for sale at auction and then returns them unsold to the person who supplied them, who turns out to be a rogue, is not liable in conversion to the person truly entitled to possession[73].

III. Injunctions[74]

5/39 By sec 37(1) of the Senior Courts Act 1981, »[t]he High Court may by order (whether interlocutory or final) grant an injunction … in all cases in which it appears to the court to be just and convenient to do so«[75]. In general, the exercise of this power presupposes the existence of an actual or potential claim for substantive relief which the court has jurisdiction to grant[76] and the dominant modern view is that the power of the court is restricted to this and certain other exclusive categories[77].

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70 Secs 3(2), (3)(a).
71 (1872) Law Reports (LR) 7 Queen's Bench (QB) 616; affd (1875) LR 7 House of Lords (HL) 757.
72 *Lunney* in: Oliphant, The Law of Tort² § 11-6 ff.
73 *Marcq v. Christie, Manson & Woods Ltd.* [2004] QB 286.
74 See generally *K. Oliphant*, Injunctions and Other Remedies, in: idem, The Law of Tort² (2007) 373.
75 The county courts are given equivalent powers by County Courts Act 1984, sec 38 (as amended).
76 *Siskina (Cargo Owners) v. Distos Compania Naviera S.A., The Siskina* [1979] AC 210, 254 per Lord Diplock.
77 *South Carolina Assurance Co. v. Assurance Maatschappij de Zeven Provincien N.V.* [1987] AC 24, 40 per Lord Brandon.

In *Spain v. Christie, Manson & Woods Ltd.*[78], *Sir Nicholas Browne-Wilkinson* V-C advanced the wider proposition that there is »a general jurisdiction to restrain by injunction deliberate acts which either did or were calculated to cause damage to the plaintiff«. But this runs counter to longstanding and binding authority – »an allegation of damage alone will not do. You must have in our law injury as well as damage«[79] – and has been regarded as unsustainable[80].

5/40 In general, an injunction may be granted whenever a tort has been committed[81], provided that there is a risk that it may be continued or repeated, but it will be refused if there is no ground to apprehend its continuation or repetition[82]. If the commission of a tort is anticipated but has not yet occurred, a quia timet injunction may be awarded to prevent its commission[83]. It should be noted, however, that injunctions are a discretionary remedy and are not available as of right simply because a tort has been or will be committed[84]. Generally, no injunction will be granted where damages are an adequate remedy, or where the claimant acquiesced in the defendant's infringement of his legal rights, or delays excessively before seeking an injunction, or has »dirty hands«[85]. If the court concludes that the award of an injunction is inappropriate, it may choose to award damages in lieu[86].

5/41 Injunctions can be either positive or negative in form: either they make it mandatory for the defendant to perform some specified action (a mandatory injunction) or prohibit him from doing so (a prohibitory injunction). Because a mandatory injunction imposes a positive obligation, and is generally more drastic in its effect than a prohibitory injunction, the jurisdiction to make such an award is »to be exercised sparingly and with caution«[87]. There are four governing propositions: the plaintiff must show a very strong probability that grave damage will accrue to him in the future; damages will not be a sufficient or adequate remedy if some damage does accrue; the possible damage to the plaintiff must be balanced against the cost to the defendant of doing works to prevent its occurrence or lessen its likelihood; and the terms of the injunction must be stated clearly so that the defendant is made aware of precisely what he has to do[88].

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78 [1986] WLR 1120, 1130.
79 *Day v. Brownrigg* (1878) 10 Law Reports, Chancery Division (2nd Series) (Ch D) 294, 304 per Jessel MR.
80 *Associated Newspapers Group plc v. Insert Media Ltd.* [1988] 1 WLR 509, 513 per Hoffmann J.
81 Injunctions are generally available in respect of the commission of a tort, but their application to some particular types of tortious liability, including the liability for negligence, has been doubted. See *Oliphant* in: idem, The Law of Tort² § 8.6.
82 *Quartz Hill Consolidated Gold Mining Co. v. Beall* (1882) 20 Ch D 501; *Proctor v. Bayley* (1889) 42 Ch D 390.
83 *Hooper v. Rogers* [1975] Law Reports, Chancery Division (3rd Series) (Ch) 43.
84 *Armstrong v. Sheppard & Short Ltd.* [1959] 2 QB 384, 396 per Lord Evershed MR.
85 *Oliphant* in: idem, The Law of Tort² § 8.12 ff.
86 Senior Court Act 1981, sec 50.
87 *Redland Bricks Ltd. v. Morris* [1970] AC 652, 665 per Lord Upjohn.
88 *Redland Bricks Ltd. v. Morris* [1970] AC 652, 665 f per Lord Upjohn.

IV. Self-help

5/42 A person may excuse the use of force against the person or property of another by raising a defence of self-defence or necessity. Likewise, an owner or person entitled to the immediate possession of land may use force to eject a trespasser, provided the force used is reasonable[89]. By an Act of 2003, however, a more lenient test of whether the act was »grossly disproportionate« now applies where the defendant acted only because he believed it was necessary to do so to recover property[90]. Additionally, the remedy of *abatement* is available in respect of a nuisance or trespass by encroachment – for example, by trimming the overhanging branches of a neighbour's tree or by entering neighbouring land to remove the trouble at source, so long as this can be done peaceably and without causing disproportionate hardship. As a general rule, the abator should give notice before entering for this purpose. There is no right to abatement where the injured party has previously brought an unsuccessful action for a mandatory injunction to remove the offending object . Because victims of a nuisance or trespass generally ought not to take the law into their own hands, the right of abatement is subject to significant limitations and should be restricted to simple cases which would not justify the expense of legal proceedings and urgent cases which require an immediate remedy[91].

V. Unjust enrichment

5/43 The law of restitution has developed rapidly in England and the Commonwealth in recent decades, with the development of general theories of unjust enrichment in place of what had previously been seen as a motley set of at best distantly related rules grouped under the headings quasi-contract and quasi-tort[92]. It is accepted that what are sometimes termed »*restitutionary damages*« are sometimes available in respect of the commission of a tort, though they are not a general remedy in the law of tort. Indeed, whether they are *ever* a remedy for a tort as such – as opposed to an unjust enrichment that is coincidentally a tort – may be disputed[93].

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89 *Hemmings v. Stoke Poges Golf Club Ltd.* [1920] 1 Law Reports, King's Bench (KB) 720. Statutory limitations apply in respect of dwellings and tenancies.

90 Criminal Justice Act 2003, sec 329.

91 *Oliphant* in: idem, The Law of Tort[2] § 8.62 ff.

92 See especially *C. Mitchell/P. Mitchell/S. Watterson*, Goff & Jones: The Law of Unjust Enrichment[8] (2011); *P. Birks*, An Introduction to the Law of Restitution (revised edn, 1989).

93 See generally *Law Commission*, Aggravated, Exemplary and Restitutionary Damages (Law Com No 247, 1997); *J. Edelman*, Gain-Based Damages (2002); *C. Rotherham*, The Conceptual Structure of Restitution for Wrongs [2007] Cambridge Law Journal (CLJ) 172.

In any case, it is clear that there can be an unjust enrichment without any element of tortious conduct – for example, the recipient of a mistaken payment is prima facie obliged to return its value even though not at fault or otherwise responsible for its receipt or retention.

VI. Avoidance of contracts

5/44 The UK's insolvency legislation contains specific provisions against debt avoidance. Whether or not insolvency proceedings have been commenced, a company's transaction at an undervalue (including a gift) may be avoided if done for the purpose of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or of otherwise prejudicing the interests of such a person in relation to such a claim. In such a case, the court may make such order as it thinks fit for restoring the position to what it would have been if the transaction had not been entered into, and protecting the interests of persons who are victims of the transaction[94]. For example, it may require any property transferred as part of the transaction to be vested in any person, either absolutely or for the benefit of the victims of the transaction or it may require payment to any person in respect of benefits received from the debtor of such sums as the court may direct[95]. The order may be made against any person, but may not prejudice any interest in property which was acquired from a person other than the debtor and was acquired in good faith, for value and without notice of the relevant circumstances[96]. It follows that the person receiving the property from the debtor may be subject to such order even if acting in good faith, providing value, and lacking notice of the relevant circumstances. Such person can thus be ordered to give up property or make a payment even in circumstances in which (eg for lack of fault) no tortious liability would arise.

94 Insolvency Act 1986, sec 423. The provision has »a long pedigree« in English law, dating back to the Fraudulent Conveyances Act 1571: *G. Miller*, Transactions Prejudicing Creditors [1998] Conveyancer and Property Law (Conv) 362, 363. Its roots lie in the actio Pauliana of Roman law: *A. Keay*, Transactions Defrauding Creditors: The Problem of Purpose under Section 423 of the Insolvency Act [2003] Conv 272, 274. As regards the separate power to set aside transactions at an undervalue or the grant of a preference in the period before the onset of insolvency, see Insolvency Act 1986, secs 288 and 289. As regards individuals who are adjudged bankrupt, see Insolvency Act 1986, sec 284.

95 Insolvency Act 1986, secs 424(2) and 425.

96 Insolvency Act 1986, sec 425(2).

VII. Damages

5/45 Damages are the primary remedy for torts, breaches of contract and other common law wrongs. They may take the following forms: compensatory damages; restitutionary damages; exemplary (or punitive) damages; aggravated damages; nominal damages; and contemptuous damages.

A. Compensatory damages

5/46 Compensation is the principal aim of damages in all common law systems. The objective is sometimes expressed through the Latin phrase *restitutio in integrum*. The basic rule is that »compensation should as nearly as possible put the party who has suffered in the same position as he would have been in if he had not sustained the wrong«[97].

B. Restitutionary damages

5/47 These are considered under no 5/43 above.

C. Exemplary (or punitive) damages

5/48 Punitive or, as most prefer to call them, exemplary damages are recognised by English law but confined at common law to two established categories: oppressive, arbitrary or unconstitutional action by servants of the government, and wrongful conduct by the defendant which has been calculated by him to make a profit for himself which may well exceed the compensation payable to the claimant[98]. It remains unclear whether exemplary damages are available in respect of all torts or only specific causes of action[99]. In some Commonwealth jurisdictions, a wider right to exemplary damages is recognised.

D. Aggravated damages

5/49 Aggravated damages are compensatory in purpose, but compensate for non-pecuniary harm that does not fall under the normal heads of non-pecuniary loss[100]

97 *Lim v. Camden & Islington Area Health Authority* [1980] AC 174, 187 per Lord Scarman.

98 *Rookes v. Barnard* [1964] AC 1129. See further *V. Wilcox*, Punitive Damages in England, in: H. Koziol/V. Wilcox (eds), Punitive Damages: Common Law and Civil Law Perspectives (2009).

99 See *K. Oliphant*, England, in: H. Koziol/B.C. Steininger (eds), European Tort Law 2001 (2002) no 45, discussing *Kuddus v. Chief Constable of Leicestershire* [2001] UKHL 29, [2002] 2 AC 122.

100 See no 5/76 ff.

attributable to the tortious injury (eg distress suffered as a result of a hostile cross-examination at trial). It has been observed that the distinction between basic and aggravated damages is necessary because the right to recover for intangible consequences such as humiliation, injury to pride and dignity, as well as for the hurt caused by the spiteful, malicious, insulting or arrogant conduct of the defendant, attaches to some causes of action and not others[101]. However, aggravated damages have some features which make them appear punitive as they traditionally require that the defendant should be guilty of some exceptional misconduct. In 1997, the Law Commission recommended legislation to clarify the role of aggravated damages[102], but the Government subsequently concluded that it is now sufficiently clear that the purpose of aggravated damages is compensatory and not punitive as to obviate the need for a statutory definition[103].

E. Nominal damages

5/50 The award of nominal damages denotes that the claimant's rights have been infringed by the defendant's tortious conduct even though the claimant has suffered no loss as a consequence. Their practical relevance is thus in the areas of torts actionable per se. Though successful claimants are awarded no more than a few pounds, they will normally also obtain a costs order in their favour, even if (for example) they fail in a concurrent attempt to gain an injunction. Additionally, the award performs the important function of vindicating the claimant's rights. There is no separate category of vindicatory damages. Though the making of a substantial vindicatory award in cases of serious infringement of the claimant's right has been supported by some authorities[104], it was comprehensively rejected by the Supreme Court in 2011[105], with the approval of the majority of scholars[106].

101 *Rowlands v. Chief Constable of Merseyside Police* [2006] Court of Appeal (Civil Division) (EWCA Civ) 1773, [2007] 1 WLR 1065 at [27].

102 Aggravated, Exemplary and Restitutionary Damages (Law Com No 247, 1997).

103 Department of Constitutional Affairs, The Law of Damages (CP 9/07, 2007) para 205. As to aggravated damages in English law generally, see *A.J. Sebok/V. Wilcox*, Aggravated Damages, in: H. Koziol/V. Wilcox (eds), Punitive Damages: Common Law and Civil Law Perspectives (2009) 257 ff.

104 *Ashley v. Chief Constable of Sussex Police* [2008] 1 AC 962 at [22]–[23] and [29] per Lord Scott.

105 *R (on the application of Lumba) v. Secretary of State for the Home Department* [2011] United Kingdom Supreme Court (UKSC) 12, [2012] 1 AC 245.

106 See *V. Wilcox*, Vindicatory Damages: The Farewell (2012) 3 Journal of European Tort Law (JETL) 390, with further references.

F. Contemptuous damages

5/51 If a court wishes to express contempt for the conduct of a claimant who has been successful on a legal technicality, it may assess the general damages in the amount of a contemptuous sum (eg £ 1). In practice, such awards are limited to proceedings in defamation, and they are often accompanied by an award of costs against the claimant, notwithstanding the usual »loser pays« rule[107].

VIII. Criminal liability

5/52 Criminal liability exposes the offender to punitive sanctions which may include the loss of liberty. Their imposition may be discretionary or mandatory. As these consequences – and the stigma that arises from a conviction – are weightier than those resulting from incurring of civil liability, the conditions for its imposition are generally more stringent. For most offences against the person, as well as for criminal damage, the prosecution must demonstrate *mens rea*, meaning intention or recklessness as regards the specified consequence. Recklessness is construed as requiring conscious advertence to the risk, and is thus qualitatively different from negligence, not merely different in degree. Negligence is generally insufficient for the imposition of criminal liability, and even gross negligence is only sufficient for certain offences (though one of these is manslaughter). The standard of proof in criminal trials is also more onerous than in civil cases: proof beyond reasonable doubt, rather than proof on the balance of probabilities.

IX. Other mechanisms

5/53 The topics of insurance, social security or special compensation funds are covered elsewhere in this chapter, and it is not necessary to repeat here what is said there.

107 *Grobbelaar v. News Group Newspapers Ltd.* [2002] 1 WLR 3024.

Part 3 The tasks of tort law

I. Introductory remarks

Tort law embodies the principle of corrective justice: one who wrongfully causes another harm should correct that injustice by the payment of compensation[108]. The author of one especially influential account of tort law in these terms, *Weinrib*, explains further: »The most striking feature about private law is that it directly connects two particular parties through the phenomenon of liability. Both procedure and doctrine express this connection. Procedurally, litigation in private law takes the form of a claim that a particular plaintiff presses against a particular defendant. Doctrinally, requirements such as the causation of harm attest to the dependence of the plaintiff's claim on a wrong suffered at the defendant's hands. In singling out the two parties and bringing them together in this way, private law looks neither to the litigants individually nor to the interests of the community as a whole, but to a bipolar relationship of liability.«[109] **5/54**

On *Weinrib's* account, »[o]nly if the plaintiff and defendant are linked in a single and coherent justificatory structure can one make sense of the practice of transferring resources directly from the defeated defendant to the victorious plaintiff«[110]. Consequently, tort law can perform a rational function only if it abstains from all attempts to achieve instrumental goals, and tort lawyers should give up evaluating tort law in terms of such external (social rather than legal) goals and seek an »internal« understanding of the law in the notion of corrective justice. More specifically: tort law risks incoherence if it seeks to pursue »public« goals, for example, the »efficient« deterrence of accidents or the provision of accident compensation, because such goals are inconsistent with the bipartite nature of legal proceedings. **5/55**

Most courts and commentators, even if they accept *Weinrib's* starting points, would stop short of his final conclusion and his asceticism vis-à-vis the positing of goals, aims, tasks, functions, etc, of the law of tort. In fact, quite a number of objectives have been identified[111], including the vindication of the rights[112], denunciation of the defendant's wrong, education of people generally as to proper stand- **5/56**

108 A recent attempt to analyse the English law of negligence in corrective justice terms may be found in *Beever*, Rediscovering the Law of Negligence.
109 *E. Weinrib*, The Idea of Private Law (1995) 1.
110 Ibidem 2.
111 See generally *G. Williams*, The Aims of the Law of Tort [1951] Current Legal Problems (CLP) 137.
112 *R. Stevens*, Torts and Rights (2007).

ards of conduct, and the peaceful settlement of disputes arising from the accidental infliction of injury (»appeasement«)[113]. The two most often cited objectives of tort law, however, are compensation and deterrence.

II. Compensation

5/57 »Compensation« is frequently cited as an objective of the law of tort, but there is some slippage between two distinct conceptions: first, that tort law should be evaluated by its ability to compensate for *all* injuries; secondly, that tort law aims at compensation as part of a regime of corrective justice. The first is a normative claim and manifestly implausible: tort law cannot be expected to compensate for all injuries, and even if it could its costs would be far too great. The second is more of a descriptive claim: tort law – by compensating for harm done by A to B in circumstances where A is fairly accountable for it – corrects what would otherwise be an injustice. Nowadays, compensation is most often thought of in the latter terms, which evidently leaves open the crucial question of when, and for what harms, one person is fairly accountable in tort law to another.

III. Deterrence

5/58 The deterrence function of tort law is said to have been first proposed in England by *Jeremy Bentham* (1748–1832)[114], but has achieved especial prominence through the writings of mainly American scholars who analyse tort law in economic terms and posit economic efficiency as its ultimate goal. Though many of the key insights of the economic analysis of law were anticipated in the judicial and extrajudicial writings of *Baron Bramwell* in the late nineteenth century[115], modern law and economics has not gained much of a foothold amongst tort lawyers in England or elsewhere in the Commonwealth. Deterrence is mostly viewed as a useful by-product of civil liability, rather than its overriding objective.

113 *Williams* [1951] CLP 137, 138 (commenting that this function takes a subordinate place in the modern law).

114 *Williams* [1951] CLP 137, 144.

115 See *K. Oliphant*, *Rylands v Fletcher* and the Emergence of Enterprise Liability in the Common Law, in: H. Koziol/B.C. Steininger (eds), European Tort Law 2004 (2005) 81, no 47 ff.

IV. Punishment

Viewed in historical terms, punishment is certainly not alien to tort. According to *Sir Henry Maine*, for example, »the penal law of ancient communities is not the law of crimes; it is the law of wrongs, or, to use the English technical word, of torts«[116]. Still, though »punitive« or »exemplary« damages may be awarded in England and certain Commonwealth jurisdictions in particular circumstances[117], punishment as such is not nowadays considered the function of tort law. **5/59**

V. Mixed accounts

Probably most tort lawyers in England and the Commonwealth would say that tort law pursues a mixture of different tasks[118], but there must be constraints on what it can do for reasons of fairness to the parties, as well as administrative efficiency. A particularly notable account of this nature has been provided by *Tony Honoré*[119]. In his view, it is a mistake to search for a single justification (eg compensation or deterrence) for the system as a whole, or even to think in terms of a compound aim for the system (eg a mixture of compensation, deterrence and corrective justice). That would be to run together questions that ought to be kept separate. For present purposes, it is enough to highlight just three: (a) what general aims justify the state in maintaining a system of tort law?; (b) what justifies the person whose rights have been infringed in claiming compensation from the wrongdoer?; and (c) subject to what conditions may one who by his conduct has infringed the rights of another be required to pay compensation? **5/60**

A. General justifying aims

On *Honoré's* account, the general justifying aims of tort law are to reduce the level of undesirable conduct by stamping it as wrongful (though in a less stigmatic way than criminal law), forbidding it or, at a minimum, warning those who indulge in it of the liability they may incur. To that extent, tort law can be seen as a means of social control. But at the same time, by creating torts rather than crimes, the law **5/61**

116 Ancient Law (1861) 328.

117 See no 5/48 above.

118 Cf the theory of »complementarity« applied to tort law by *I. Englard* in: D.G. Owen (ed), The Philosophical Foundations of Tort Law (1997).

119 *T. Honoré*, The Morality of Tort Law: Questions and Answers, in: idem, Responsibility and Fault (1999).

defines and gives content to people's rights by providing them with a mechanism for protecting them and securing compensation if their rights are infringed.

B. Justifying the distribution of tortious liability

5/62 In pursuing these general aims, however, the law should also develop principles which govern the »distribution« of tortious liability. Here, *Honoré* highlights corrective justice (the harm-doer's wrong must violate the harm-sufferer's right); his own theory of »outcome responsibility«[120] (which assumes that the defendant is of full capacity and hence in a position to control his behaviour); and distributive justice (including the just distribution of risks, and the allocation of burdens in proportion to benefits).

C. Conditions for the imposition of tortious liability

5/63 Yet even the principles of justice that dictate the prima facie distribution of tortious liability must be tempered, for applied without limitation they may also produce injustice. For that reason, *Honoré* proposes that their application should be restricted by reference to retributive justice: the defendant ought not to be made to pay unless he has chosen to do what the law forbids, or otherwise acted with fault, except where insurance is available to lessen the burden on him, and any liability imposed should be proportionate to the gravity of his conduct. The general exclusion of liability for unforeseeable consequences is one mechanism by which the law can effect a rough proportionality between conduct and liability, though the limitation of liability it supplies can be somewhat arbitrary.

120 See no 5/129 below.

Part 4 The area between tort and breach of an obligation

I. Introductory remarks

5/64 It is certainly true that there are some civil wrongs that are hard to ascribe exclusively to the law of tort as opposed to some other category of obligation. One example is provided by the law of bailment. At common law, the bailee of goods owes a duty to take reasonable care of the goods and to refrain from converting them. To that extent, any liability arising is concurrent with a liability in tort. But some of the bailee's obligations are incapable of being categorised as tortious or contractual in nature, for example, the strict obligation to compensate loss or damage resulting from the bailee's departure from the terms of the bailment, which applies even to an unrewarded bailee under a gratuitous bailment (there being no contract by reason of a lack of consideration)[121]. That is a liability that may best be regarded as sui generis. Claims against an agent for breach of warranty of authority may fall into this category, as well as claims for misrepresentation. The obligations of common carriers and innkeepers should also be mentioned in this context.

II. Tort, breach of contract and the intermediate area

5/65 Particular attention has been given to the intermediate area between tort and contract – or »contorts« as one commentator has wryly called it[122]. In *Hedley Byrne & Co. v. Heller & Partners Ltd.*[123], the House of Lords departed from the longstanding general exclusion of extra-contractual liability in respect of pure economic loss, and recognised in principle that liability might arise where one party voluntarily assumes responsibility to another in the context of a special relationship that is »equivalent to contract«. The new liability principle was considered to be a principle of the law of tort, but it was recognised that it stands apart from tort law as customarily conceived. Amongst its distinguishing features are that it is based on an

121 *Mitchell v. Ealing London Borough Council* [1979] QB 1, [1978] 2 All England Law Reports (All ER) 779.
122 *S. Hedley*, Negligence – Pure Economic Loss – Goodbye Privity, Hello Contorts [1995] CLJ 27.
123 [1964] AC 465.

obligation that is voluntarily assumed by the defendant, rather than imposed by law in the way of tort obligations generally, that it requires a preexisting relationship between the parties, and of course that the loss suffered is purely economic, which is generally the field of contract law rather than tort. Though the development has mostly been viewed with favour, it is also recognised that it has the potential to »short-circuit« the ordinary requirements applicable to the enforcement of contractual undertakings, for example, by giving the claimant the benefit of a gratuitous undertaking[124], or of a contractual undertaking contained in a contract to which the claimant was not privy and which is not directly enforceable by him[125]. Consequently, the further development of *Hedley Byrne* liability has been extremely cautious, especially in England.

124 In English law, a gratuitous undertaking is not contractual because (by definition) no consideration is provided as a quid pro quo.

125 Cf Contracts (Rights of Third Parties) Act 1999.

Part 5 The basic criteria for a compensation claim

I. Damage

There is no general concept of »damage« in English tort law, and academic discussions of the topic have been few in number, but damage does play an important role in most torts recognised by English law. As there are, according to one estimate, some 70 or more torts recognised by the common law[126], it could be said that there are in fact 70 or more different conceptions of damage in English tort law. That is to overstate the case somewhat, but it gives some indication of the difficulty facing an English lawyer in this area. It by no means follows that what is recognised as damage in Tort A is so recognised in Tort B. **5/66**

Any account of damage in English law must start by noting the two principal »forms of action« recognised in the writ system that survived until 1875, namely, trespass and the action on the case (or, more simply, »case«)[127]. Most of the modern English law of tort can be traced directly back to these two actions. For present purposes, the main point of distinction between the two actions is that trespass was actionable on proof of the specified interference (to the person, to goods or to land), even if the claimant suffered no damage, while, in case, damage was the gist of the cause of action. The three forms of trespass recognised under the writ system – trespass to the person (sub-divided into assault, battery and false imprisonment), trespass to goods, and trespass to land – survive in modern English tort law. Case, by contrast, is no longer recognised as such, but a large number of modern-day actions can be identified as its descendents, and follow it in requiring proof of damage. By far the most important of these descendents, both practically and conceptually, is the tort of negligence. Here, damage plays a crucial, if somewhat concealed, role in determining whether – as must be shown if liability is to be imposed – the defendant owed the claimant a duty of care. Here, the *type* of damage suffered by the claimant is given particular significance (eg whether it is physical damage or pure economic loss or mental injury). However, such classifications really go to the question of »scope of liability« rather than damage as such are so are considered further at no 5/141 ff. **5/67**

126 *B. Rudden*, Torticles (1991-1992) 6/7 Tulane Civil Law Forum (Tul Civ LF) 105.

127 For an account of the historical development, see *J.H. Baker*, An Introduction to English Legal History (2005).

A. Torts actionable per se

5/68 For certain torts, a cause of action may come into existence without proof of actual damage or loss[128], and in such cases the prohibited infringement of the claimant's sphere itself is the tort. Nominal damages may be recovered and, in appropriate cases, an injunction may be granted; but, if damages are sought for particular loss, a causal connection between the tort and the alleged loss must be shown.

B. Different types of damage: a hierarchy of protected interests

5/69 Generally, one may say that the common law attaches more or less weight to particular types of damage in accordance with an implicit underlying hierarchy of protected interests. Interests in the person and in property are given the highest protection; personality interests (with the exception of reputation) and purely economic interests are given lesser protection. Thus there is no general tort of invasion of privacy[129], even though particular torts protect individual aspects of the right (eg informational privacy)[130].

5/70 For some, this hierarchy of values is self-evident, but there have also been some interesting attempts to explain certain aspects of it. Thus, for example, *Witting* has sought to explain why purely economic losses are not generally recoverable in the tort of negligence, while losses associated with damage to property are[131]. To this end, he develops what he terms a »personality thesis«: »whereas an individual's personality is partly constituted by the property that he or she owns, so that property can be seen as essential to the ways in which individuals constitute and define themselves, no such claim can be made with respect to mere abstract holdings of wealth«[132]. In the author's view, this consideration better justifies the distinction the law makes between property damage and pure economic loss than other explanations that have been advanced, for example, that purely economic losses are difficult to prove or liable to be indeterminate in nature. It does not entail, however, that purely economic losses should never be recoverable in negligence.

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128 For example trespass to the person, trespass to goods and trespass to land, as well as libel and slanders actionable per se. Cf *Watkins v. Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395, deciding that damage remains an element of the tort of misfeasance in public office and that liability does not arise for invasion of a constitutional right per se.

129 *Wainwright v. Home Office* [2003] UKHL 53, [2004] 2 AC 406.

130 See *Campbell v. MGN Ltd.* [2004] UKHL 22, [2004] 2 AC 457.

131 *C. Witting*, Distinguishing between Property Damage and Pure Economic Loss in Negligence: A Personality Thesis (2001) 21 LS 481.

132 Ibidem 481.

C. Damage in specific torts

1. Public nuisance

5/71 Public nuisance has been defined as »an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects«[133]. Ordinarily only a criminal offence, a public nuisance may give rise to civil liability if it causes the claimant to suffer some »special damage«, by which is meant damage different in kind – and not merely greater in amount – than that suffered by persons generally.

2. Private nuisance

5/72 A private nuisance is the unreasonable interference with the claimant's use or enjoyment of land. As it is »a tort to land«, not a tort of general application, it is actionable only by a person with an interest in the land affected[134]. But it is not necessary to show that the claimant suffered physical harm: interference with his amenity interests will suffice. But the interference must be substantial[135]. The bare invasion of the claimant's land by things emanating from the defendant's is also actionable, again even if no physical harm results, though in such a case the claimant may be restricted to nominal damages. In such a case, the likely reason for bringing a claim would be obtaining an injunction, though it should be noted that damages for future losses may be awarded in lieu of an injunction if the claimant's loss is small, assessable in money terms, adequately compensated by a small money payment, and it would be oppressive to the defendant to grant the injunction[136].

3. Defamation (libel and slander)

5/73 Defamation has always been thought of as a somewhat distinct tortious liability and adopts a rather curious distinction between libels (defamations in permanent form), in respect of which damage is presumed, and slanders (defamations in transient form), in respect of which »special damage« must generally be proven. However, under the Defamation Act 1952, sec 3 it is provided that it is not necessary to allege or prove special damage in the following cases: (a) if the words upon which the action is founded are calculated to cause pecuniary damage to

133 *J. Stephen*, A Digest of the Criminal Law (1877) 108 approved by Lord Bingham in *R. v. Rimmington* [2006] 1 AC 459 at [36].

134 *Hunter v. Canary Wharf Ltd.* [1997] AC 655.

135 *Salvin v. North Brancepeth Coal Co.* [1873] Law Reports (LR) 9 Chancery Appeal Cases (Ch App) 705.

136 Supreme Court Act 1981, sec 50; *Shelfer v. City of London Electric Lighting Co.* [1895] 1 Ch 287.

the plaintiff and are published in writing or other permanent form; or (b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of publication. A claimant who relies on the section is not limited to nominal damages, as the purpose of the statutory provision was to give the claimant a remedy despite the difficulty of proving actual loss, and this could not be achieved if a claim brought under it could lead only to an award of nominal damages[137]. General damages may therefore be awarded for future pecuniary loss likely to be suffered by the claimant as a result of the slander.

D. Primary and consequential damage

5/74 There is no formal category of »consequential loss« in English tort law and no particular difficulty with the recovery of compensation for it. Thus, for example, a carpenter whose tools are taken away is entitled to damages not just for their value but also for any proven disruption of his trade as a consequence[138]. However, a number of writers have adopted consequential loss as a category for the purposes of exposition[139]. Moreover, in torts concerning damage to property, a distinction is drawn between the infringement of the claimant's property interest in itself, and losses consequential upon it. To the latter, a test of remoteness applies – and the ordinary rules of novus actus interveniens – but liability for the infringement itself appears not to be subject to the same requirements, as it is not negated or reduced by the intervention of unforeseen circumstances beyond the defendant's control[140]. Lastly, it may be noted in this context that there are some categories of case in which English law limits the ability of a »secondary« victim to recover damages for harm suffered in consequence of an injury suffered by, or threatened to, the »primary« victim – most notably where the secondary victim's injury is psychiatric[141]. In such circumstances, the secondary victim is owed a duty of care only where there was a relationship of love and affection with the primary victim, and the secondary victim was at the scene of the accident or came upon its immediate aftermath[142].

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137 *Joyce v. Sengupta* [1993] 1 WLR 337.

138 *Bodley v. Reynolds* (1846) 8 QB 779, 115 English Reports (ER) 1066.

139 See, eg, *H. McGregor*, McGregor on Damages[18] (2009) § 1–36, and generally *K. Oliphant*, Aggregation and Divisibility of Damage in England and Wales: Tort Law, in: idem (ed), Aggregation and Divisibility of Damage (2009) 95 ff, no 9 ff.

140 *Kuwait Airways Corporation v. Iraqi Airways Co.* [2002] UKHL 19, [2002] 2 AC 883. A comparable distinction also applies in the tort of deceit.

141 However, the rescuer cases indicate that this factor is not always an obstacle to the establishment of liability.

142 *Alcock v. Chief Constable of South Yorkshire* [1992] 1 AC 310.

E. Loss of profits

5/75 Loss of profits is in principle recoverable in an action for negligence, but, when it is not consequential on physical damage to the claimant's property or person, it constitutes pure economic loss in respect of which no duty of care will generally arise[143]. It may be noted that it is the category »pure economic loss«, not the category »loss of profit« as such, to which significance is attached in English law.

F. Pecuniary and non-pecuniary damage

5/76 The concepts »pecuniary loss« and »non-pecuniary loss« play a role mainly in the assessment of damages for personal injury. To an English lawyer it seems odd to treat these concepts as providing a categorisation of »damage« rather than »damages«: the question whether there is any damage at all is prior to the question of the pecuniary and non-pecuniary losses flowing from it. Be that as it may, there is no particular difficulty with the recovery of damages for non-pecuniary loss in English tort law. Indeed, it has been said that in tort, in contrast with the law of contract, »non-pecuniary losses flourish«[144]. The leading work on damages identifies five heads of non-pecuniary loss: (a) pain and suffering and loss of amenities (PSLA); (b) physical inconvenience and discomfort[145]; (c) social discredit (mainly limited to claims in defamation); (d) mental distress; and (e) loss of society of relatives (a statutory claim under Fatal Accidents Act 1976, sec 1A).

1. PSLA

5/77 Of the various forms of non-pecuniary loss, the most frequently encountered in practice is PSLA, which is one of the basic heads of damage where a tort results in physical injury to the claimant. The two components of the loss – pain and suffering, on the one hand, and loss of amenities on the other – are regarded as distinct, even though the practice is to award a single global sum encompassing both as-

143 *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.* [1973] QB 27.

144 *McGregor*, McGregor on Damages[18] § 3-002.

145 Awards for physical inconvenience and discomfort are usually included in the award for pain, suffering and loss of amenities, but this is not possible where there is no physical injury, and it is in such cases that physical inconvenience and discomfort forms a separate head of damages. See eg *Mafo v. Adams* [1970] 1 QB 548, CA (deceit). Contrary to the statement in *McGregor*, McGregor on Damages[18] § 3-009, personal inconvenience and annoyance is not actionable damage in the tort of private nuisance as private nuisance is a tort to land, not a tort to the person: *Hunter v. Canary Wharf Ltd.* [1997] AC 655. Damages may, however, be awarded to the extent that the interference causing the inconvenience detrimentally affects the value of the claimant's land.

pects[146]. Pain and suffering is assessed subjectively, reflecting the claimant's experience of pain and mental suffering, but loss of amenity is assessed objectively, reflecting the fact of the loss whether the claimant is aware of it or not[147]. This means that substantial damages may be awarded for loss of amenity even to a plaintiff who is unconscious[148]. Damages are designed to compensate for such results as have actually been caused. It follows, in principle, that a claimant's unconsciousness prevents any monetary award for pain or consequential worry and anxiety as he would not have suffered any (or so it is believed). An unconscious person is spared pain and suffering and does not experience the mental anguish which may result from knowledge of the amenities he has lost or the shortening of his life. The fact of unconsciousness does not, however, eliminate the actuality of the victim's loss of the amenities of life. As the two elements are combined in the award for general damages, the normal practice in such cases is for the court to refer to the normal tariff bracket for the injury in question, simply choosing a figure at the lower end of the bracket in cases where the pain and suffering component has to be reduced or eliminated because of the victim's unconsciousness[149]. It is, it should be noted, quite irrelevant what use will or might be made of the money awarded as compensation.

2. Mental distress

5/78 As the leading text observes, »[m]ental distress is not by itself sufficient damage to ground an action … However, once liability has been established, then in certain torts compensation for injury to feelings may be included in the damages … «[150]. Torts where such awards are possible include assault and battery, defamation, deceit and the statutory torts of sex, race and disability discrimination[151]. Compensation for mental distress may also be awarded in respect of a wider range of torts – including torts to property – under the head of aggravated damages[152]. Torts where damages for mental distress may not be awarded include private nuisance[153] and conspiracy[154].

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146 These are based on the tariffs indicated in guidelines promulgated by the Judicial Studies Board.

147 *Lim Poh Choo v. Camden and Islington Area Health Authority* [1980] AC 174.

148 *H. West & Son Ltd. v. Shephard* [1964] AC 326.

149 Judicial Studies Board.

150 *McGregor*, McGregor on Damages[18] § 3-011.

151 Sex Discrimination Act 1975, sec 66(4); Race Relations Act 1976, sec 57(4); Disability Discrimination Act 1995, sec 25(2).

152 See no 5/49 above. As regards the award of aggravated damages in the torts of trespass to land and trespass to goods, see *P. Giliker*, A »new« head of damages: damages for mental distress in the English law of torts (2000) 20 LS 19.

153 *Hunter v. Canary Wharf Ltd.* [1997] AC 655.

154 *Lonhro v. Fayed (No 5)* [1993] 1 WLR 1489.

Whether English common law, in any circumstances, recognises »freestanding« distress as damage – as opposed to distress consequential on other, recognised injury – is an interesting question. It has been argued that there should be a liability where the infliction of distress is intentional, relying on the famous case of *Wilkinson v. Downton*[155]. There the defendant, as a practical joke, told the plaintiff that her husband had been seriously injured in a road accident. She suffered serious and permanent physical consequences as a result and sued for damages. Allowing her claim, *Wright* J stated the rule to be applied as follows »The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff – that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act«[156]. **5/79**

However, that was a case of »nervous shock« resulting in physical harm, not mere distress, so it is not strictly in point. Nevertheless, judicial dicta recognise that there is an argument for treating the intention to cause harm as sufficient to justify a departure from the normal requirement that there should be physical harm or at least a recognised psychiatric condition, provided the intention element is narrowly defined[157], though this was explicitly rejected when the issue came before the Court of Appeal in 2001[158]. **5/80**

Freestanding distress may, however, be actionable damage under statute: if harassment, alarm or distress is caused by »a course of conduct«, there may be a statutory remedy in damages under the Protection from Harassment Act 1997 (whether or not the effect on the victim was intended)[159]. **5/81**

G. Non-pecuniary loss and legal persons[160]

English law does not formally exclude the possibility of awarding damages for non-pecuniary loss to a legal person. Admittedly, a corporation cannot suffer »pain« or »distress« as such[161], but it is accepted that it may suffer »social discredit«. Consequently, it has long been recognised that a trading corporation can **5/82**

155 [1897] 2 QB 57.
156 [1897] 2 QB 57, 58 f.
157 *Hunter v. Canary Wharf Ltd.* [1997] AC 655, 707 per Lord Hoffmann; *Wainwright v. Home Office* [2004] 2 AC 406 at [44] per Lord Hoffmann.
158 *Wong v. Parkside Health NHS Trust* [2001] EWCA Civ 1721, [2003] 3 All ER 932.
159 Protection from Harassment Act 1997, sec 1(1), (2).
160 Doctoral research currently being pursued by *V. Wilcox* may require a re-evaluation of the analysis in the paragraph below in due course.
161 And hence is not a person that can suffer »harassment« under the Prevention of Harassment Act 1997: *Daiichi UK Ltd. v. Stop Huntingdon Animal Cruelty* [2004] 1 WLR 1503.

recover damages for its loss of reputation. Though sec 1 of the Defamation Act 2013 now restricts liability to situations where the reputational harm has caused or is likely to cause the corporation serious financial loss, this does alter the basis on which damages for defamation should be assessed. The good name of a company is a thing of value and there is no good reason why the law should not protect it[162]. However, this very formulation – even if not all »value« is economic – raises the question whether the interest a corporation has in its reputation can really be classified as non-pecuniary interest; indeed, it has been argued that it cannot, and for that reason that it should not be protected by the law of defamation[163]. In any case, by way of exception to the general rule that legal persons can sue for injury to their reputation, democratically elected organs of government (including local authority corporations) have no right to maintain an action of damages for defamation[164]. Additionally, although a trade union has quasi-corporate status and is capable of suing in tort in its own name[165], its lack of true legal personality precludes it bringing an action in defamation: it does not have a separate legal personality capable of being defamed[166]. One may say, therefore, that there is no decisive evidence that English law does in fact award damages for non-pecuniary loss suffered by legal persons.

H. Loss of the enjoyment of a holiday

5/83 Loss of the enjoyment of a holiday is compensable damage – at least when it results from personal injury[167] or some other independently actionable harm. It has generally been assumed that the lost enjoyment of a holiday is not actionable *in the absence of* independently actionable harm[168]. Where compensation is awarded, it is normally under the heading of general damages (ie as non-pecuniary loss)[169].

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162 *Jameel v. Wall Street Journal Europe SPRL* [2006] UKHL 44, [2007] 1 AC 359.

163 *Howarth* (2011) 74 MLR 845.

164 *Derbyshire County Council v. Times Newspapers* [1993] AC 534.

165 Trade Union and Labour Relations (Consolidation) Act 1992, sec 10.

166 *Electrical, Electronic, Telecommunication and Plumbing Union v. Times Newspapers Ltd.* [1980] QB 585.

167 See eg *Ichard v. Frangoulis* [1977] 1 WLR 556; *Graham v. Kelly & East Surrey NHS Trust (No 2)* [1997] Current Law Yearbook (CLY) 1818; *Bastow v. Mann* [2008] CLY 2851.

168 *Jackson v. Horizon Holidays Ltd.* [1975] 1 WLR 1468.

169 Separate sums may be awarded for loss of enjoyment of the holiday and general damages (see eg *McMullen v. Lynton Lasers Ltd.* [2006] CLY 3186; *Campbell v. Meyer* [2007] CLY 3129), but the loss still seems to have been treated as non-pecuniary. A very large sum for loss of enjoyment of a holiday (£ 4,000) was awarded in *Borton v. First Choice Holidays & Flights Ltd.* [2007] CLY 3253, but the claimant there was getting married and, having gone down with food poisoning, was unable to walk to her ceremony on the beach, or to eat or drink anything at the reception; her subsequent honeymoon was also ruined. The award of £ 850 in *McMullen* (claimant unable to go on the rides at Disneyland) is more typical.

But it may perhaps be questioned if this analysis would prevail if the claimant was prevented entirely from taking a holiday that he had already paid for.

I. Loss of the use of property

5/84 The claimant is entitled to damages for »loss of use« of a damaged chattel even if he is able to call upon the services of a substitute that has been kept in reserve. In the leading case[170], the *Earl of Halsbury* put the following example: »Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by shewing that I did not usually sit in that chair, or that there were plenty of other chairs in the room? The proposition so nakedly stated appears to me to be absurd …«. Whether the law actually goes so far may, however, be doubted. In *Alexander v. Rolls Royce Motor Cars*[171], the Court of Appeal declined to award damages for loss of use in a case of damage to a private motor car of which the plaintiff made little and only intermittent use. The true principle appears to be that damages for loss of use are available only where financial loss or inconvenience can be assumed, or where the claimant has incurred expense in maintaining a substitute chattel for use in the event of damage to that which is normally in use.

5/85 In shipping cases, it has been usual to award a sum equivalent to interest payable on the vessel's depreciated capital value during the period for which it was out of use[172], but this may not be appropriate where the damaged property is liable to depreciate rapidly in value. This could lead to considerable inconsistency in the quantum of awards depending upon the age of the property in question. Thus, where a city corporation lost the use of one of its buses for 69 days as the result of a collision caused by the negligence of another driver, but used one of the reserve buses it maintained for emergencies while the damaged vehicle underwent repairs, they were deprived of a valuable chattel and entitled to substantial damages calculated by reference to the daily cost of maintaining a bus in the reserve fleet[173]. This could be considered to produce a sum roughly equivalent to the chattel's value to its owners, and had the merit of providing a reasonably stable basis for calculation that was as fair as possible to each side. The risk of this approach is that it can be seen to put »a premium upon inefficiency«[174] insofar as higher maintenance costs would lead to higher damages, but in the case of property that

170 *The Mediana* [1900] AC 113, 117.
171 [1996] Road Traffic Reports (RTR) 95.
172 *The Chekiang* [1926] AC 637; *The Hebridean Coast* [1961] AC 545.
173 *Birmingham Corporation v. Sowsbery* [1970] RTR 84.
174 [1970] RTR 84, 86 f.

depreciates rapidly in value the advantages may be considered to outweigh the disadvantages. The analysis does not entail that the defendant's tort »caused« the plaintiff to spend money on maintaining a reserve bus: that expenditure was simply used as the best approximation of the loss the plaintiffs suffered by reason of the damaged bus being out of service.

J. Wrongful conception, wrongful life and wrongful birth

5/86 As in many other legal systems, English law has experienced great difficulties in recent decades in dealing with claims for wrongful conception, wrongful life and wrongful birth.

1. Wrongful conception

5/87 Wrongful conception indicates the situation where a woman has conceived a child through the tortious conduct of another person. The most common scenario is a negligently performed sterilisation operation, either on the woman herself or her partner. In such a case, the mother may recover damages for the (pecuniary and non-pecuniary) effects of the pregnancy and birth themselves, but not the economic loss constituted by the costs of rearing the »unwanted« child[175]. There has been some equivocation as to whether the economic loss is pure or consequential, not just as regards the father but also the mother, but it seems clear that this does not matter in this context[176].

5/88 To the damages recoverable by the mother in respect of the pregnancy and birth is to be added a conventional award in recognition of the injury to the parents' autonomy. »Conventional« here signifies that the award is independent of the actual effects on the parents of having an »unwanted« child, and is of fixed amount. It seems to be awarded in respect of a presumed non-pecuniary loss. The award may be regarded as compensatory[177]. The figure awarded (£ 15,000[178]) may be compared with the smaller conventional sum of £ 11,800 that is awarded by statute to the parents of a child who is killed by another person's tort[179]. It seems that

175 *McFarlane v. Tayside Health Board* [2000] 2 AC 59; *Rees v. Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 AC 309.

176 In *McFarlane*, Lord Steyn (at [79]) and Lord Hope (at [96]) considered the loss was purely economic, and Lord Hope repeated this opinion in *Rees* (at [52]), but Lord Steyn (*McFarlane*, at [79]) and Lord Millett (*McFarlane*, at [109]) said that it was irrelevant whether the economic loss was pure or consequential.

177 In the leading case, this was expressly the view of Lord Millett, but Lord Bingham – for reasons which are hard to fathom – stated it was not compensatory.

178 Following *Rees v. Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 AC 309.

179 Fatal Accidents Act 1976, sec 1A. The award is made only if the child was under the age of 18 at the date of his death.

the award is for the injury suffered by both parents, and it may be anticipated that difficult questions will arise as to who gets the money, and how much, if the parents have separated at the time of the birth, or have never been »together« at all.

5/89 The above principles apply not just in the case of a healthy child with healthy parents, but also where a healthy child is born to a disabled parent. It is yet to be finally resolved whether the same applies where it is *the child's* disability that materially increases the costs of care. The Court of Appeal has allowed recovery of the »additional« caring costs (pecuniary damage) in such a case[180], but the correctness of that decision subsequently divided the House of Lords (obiter)[181] and to that extent remains open.

2. Wrongful life

5/90 English law does not recognise a claim for »wrongful life«, which is a claim brought by a child who alleges that the mother's physician or health care institution should have enabled her to have an abortion in view of the severe abnormality of the foetus and consequently the severe disability of the child when born[182]. Such claims are contrary to public policy because imposing a duty on the doctor to advise an abortion on grounds of the child's likely disability would »make a further inroad on the sanctity of human life … [and] would mean regarding the life of a handicapped child as not only less valuable than the life of a normal child, but so much less valuable that it was not worth preserving«[183]. In addition, it is utterly impossible to put a value upon the child's loss in such a case, which requires a comparison between life in the child's present condition and not being born at all[184], or to determine the degree of disability that would entitle the child to bring such an action[185].

5/91 This approach accords with recommendations in two official reports, both of which noted the concern that an action for wrongful life would place doctors under intolerable pressure to advise abortions in doubtful cases lest they subse-

180 *Parkinson v. St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2002] QB 266. See *H. Koziol/B.C. Steininger* (eds), European Tort Law 2001 (2002) 131, nos 47–53.

181 In *Rees v. Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 AC 309 the House of Lords was evenly divided between those who thought it was right to allow recovery of the additional child-rearing costs attributable to the child's disability, and those who thought it was wrong, with one Law Lord declining to express an opinion. See *K. Oliphant*, England and Wales, in: H. Koziol/B.C. Steininger (eds), European Tort Law 2003 (2004) 113, no 39 ff.

182 *McKay v. Essex Area Health Authority* [1982] QB 1166.

183 [1982] QB 1166, 1180 per Stephenson LJ (who conceded that the doctor might owe *the mother* a duty to allow her the opportunity to terminate the pregnancy). See also [1982] QB 1166, 1188 per Ackner LJ (sanctity of life).

184 [1982] QB 1166, 1181 f per Stephenson LJ, 1189 per Ackner LJ, and 1192 f per Griffiths LJ.

185 [1982] QB 1166, 1193 per Griffiths LJ. Cf 1180 f per Stephenson LJ and 1188 per Ackner LJ.

quently be sued for damages[186]. Nevertheless, the court's reasoning has attracted considerable academic criticism[187], with some commentators going so far as to call for the recognition of a cause of action for wrongful life in English law[188]. The facts of the leading case arose before the implementation of the Congenital Disabilities (Civil Liability) Act 1976, which supersedes all previously effective legal provisions governing liability to children in respect of their congenital disability[189], and the Act's passage effectively precludes wrongful life claims relating to births from its in-force date in 1976 on[190]. It has been suggested[191], however, that the subsequent extension of the Act to make specific provision for infertility treatments[192] has opened the door for wrongful life claims in a limited set of circumstances, namely, where the disability results from negligence in the selection of a damaged embryo to place in the mother, or damaged gametes to create the embryo, but this has yet to be tested in court.

3. Wrongful birth

5/92 In the English legal literature, wrongful birth actions are seen to be based on the mother being deprived of the opportunity to have an abortion by the defendant's negligence (eg in failing to detect an abnormality in the foetus). They therefore raise policy considerations which overlap to a very great extent with those in the wrongful life scenario. Nevertheless, as in wrongful conception cases, the courts allow the recovery of damages for losses, including pain and suffering, arising directly out of the birth, plus a conventional sum for injury to reproductive autonomy, though not the ordinary costs of child-rearing[193]. This approach has been

186 *Law Commission*, Report on Injuries to Unborn Children (Law Com No 60, 1974) § 89; *Royal Commission on Civil Liability and Compensation for Personal Injury*, Report Cmnd 7054, vol 1, § 1485 f. In *McKay v. Essex Area Health Authority* [1982] QB 1166, 1192 Griffiths LJ expressed scepticism about this argument, observing that the final decision always rested with the pregnant woman, and the doctor's duty was only to advise of the pros and cons.

187 See eg *T. Weir*, Wrongful Life – Nipped in the Bud [1982] CLJ 225; *A. Grubb*, »Wrongful Life« and Pre-Natal Injuries (1993) 1 Medical Law Review (Med L Rev) 261, 263–265; *A. Grubb*, Problems of Medical Law, in: S. Deakin/A. Johnston/B. Markesinis, Markesinis and Deakin's Tort Law[5] (2003) 308 f. Cf *T. Weir*, Tort Law (2002) 186 (affirming that the decision was right).

188 *H. Teff*, The Action for »Wrongful Life« in England and the United States (1985) 34 International and Comparative Law Quarterly (ICLQ) 423; *A. Morris/S. Saintier*, To Be or Not to Be: Is That The Question? Wrongful Life and Misconceptions (2003) 11 Med L Rev 167.

189 Sec 4(5).

190 [1982] QB 1166, 1178 per Stephenson LJ, 1187 per Ackner LJ, and 1192 per Griffiths LJ.

191 *Grubb* (1993) 1 Med L Rev 264 f.

192 Congenital Disabilities (Civil Liability) Act 1976, sec 1A, introduced by the Human Fertilisation and Embryology Act 1990, sec 44.

193 *Groom v. Selby* [2001] EWCA Civ 1522, [2002] Personal Injuries and Quantum Reports (PIQR) P18. Assuming the approach in wrongful conception cases is followed here too, compensation would seem to be available for additional costs attributable to the child's disability: see *Par-*

subjected to a certain amount of criticism[194], and has not been followed where the hypothetical abortion would have been illegal: in such a case, public policy precludes the award of damages[195].

5/93 In principle, actions for wrongful birth may be distinguished from actions for »wrongful conception«, where the defendant's negligence causes the pregnancy of a woman who does not wish to conceive, but the distinction is not watertight because, in a wrongful conception action, it may be part of the claimant's case that the defendant's negligence meant that she did not remain as alert to the risk of pregnancy as she might otherwise have been, and deprived her of the opportunity (which she would have taken) to have an abortion[196].

II. Causation

A. Causation's normative imprint in tort law

5/94 Causation is a general requirement of liability in tort. It need not, however, be proven that the defendant *personally* caused the damage, as liability may be incurred as a joint tortfeasor for harm brought about by another person whose conduct the defendant has authorised, or with whom he was acting in concert, or with whom there is a relationship of employer and employee. Liability in such cases is independent of any causal connection between the defendant's conduct and the damage suffered, though the latter must of course be causally attributable to the conduct of the other joint tortfeasor. References in this section to »the defendant's conduct« should be read as including the conduct of a joint tortfeasor.

5/95 In common law systems, causation is typically considered to have two aspects: factual and legal. Factual causation is normally addressed through the well-known »but for« test, which requires that the defendant's conduct be a necessary condition of the claimant's harm. Legal causation is the term applied to a number of further rules that limit causal responsibility to a sub-set of »factual« causes, such limits being seen as necessary to preempt the possibility of »Adam-and-Eve causation«[197]. These include principles of *novus actus interveniens* and remoteness of damage (»proximate cause«). Some writers dispute whether principles of legal causation are principles of causation at all rather than policy-based limitations

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kinson v. St James and Seacroft University Hospital NHS Trust [2001] EWCA Civ 530, [2002] QB 266 (wrongful conception).

194 For example by *P. Glazebrook*, Unseemliness Compounded by Injustice [1992] CLJ 226.

195 *Rance v. Mid-Downs Health Authority* [1991] 1 QB 587.

196 See eg *Thake v. Maurice* [1986] QB 644, 680-1.

197 *G. Williams*, Causation in the Law [1961] CLJ 62, 64.

on liability, and regard only the issue of factual (or historical) causation as truly causal[198].

B. Cause as a necessary condition

5/96 Factual causation is normally addressed through the »but for« test, which has been explained as follows: »If you can say that the damage would not have happened but for a particular fault, then that fault is in fact a cause of the damage; but if you can say that the damage would have happened just the same, fault or no fault, then the fault is not a cause of the damage«[199].

5/97 Though the but-for test is generally regarded as a useful rule of thumb, it does not always yield the right answer[200]. In certain categories of case, the courts substitute alternative tests[201]. An alternative general theory of factual causation is that a cause need only be a necessary element of a set of conditions together sufficient for the result[202]. This differs from the but-for test in that causation is not excluded by the presence of a separate set of conditions that is also sufficient for the result.

5/98 The traditional but-for test demands a hypothetical inquiry into what would have happened if the defendant had acted non-tortiously and, paradoxically, this means that »factual« causation actually requires us to look at what did not in fact occur[203]. It needs to be considered not just how *the defendant* should have acted but also of how *the claimant* would have reacted to the defendant's hypothetical conduct – for example, in a medical case, whether the claimant would have undergone the treatment provided if properly informed of the risks[204], or how he or she would have responded to proper medical treatment if it had been provided[205]. Similarly, where the defendant employer wrongfully failed to provide a safety harness to a worker who fell to his death from scaffolding, it had to be shown that he would have worn the harness if it had been provided[206].

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198 See eg *J. Stapleton*, Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences (2001) 54 Vanderbilt Law Review 941.

199 *Cork v. Kirby Maclean Ltd.* [1952] 2 All ER 402, 407 per Denning LJ.

200 *Smith New Court Securities Ltd. v. Citibank NA* [1997] AC 254, 285 per Lord Steyn; *H.L.A. Hart/T. Honoré*, Causation in the Law[2] (1985) 113. See also *Fairchild v. Glenhaven Funeral Services Ltd.* [2003] 1 AC 32, 69 per Lord Nicholls (»over-exclusionary«).

201 See nos 5/100 f, 102 ff and 106 ff below.

202 *Hart/Honoré*, Causation in the Law[2]; *R. Wright*, Causation in Tort Law (1985) 73 Cal L Rev 1735, developing the »NESS« (necessary element of a sufficient set) test.

203 *W.P. Keeton* (ed), Prosser and Keaton on Torts[5] (1984) 265.

204 *Chatterton v. Gerson* [1981] QB 432. But cf the interesting case of *Chester v. Afshar* [2004] UKHL 41, [2005] 1 AC 134 where damages were awarded even though it was accepted that the claimant would have undergone the proposed treatment at some future date, even if not immediately.

205 *Barnett v. Chelsea and Kensington Hospital Management* [1969] 1 QB 428.

206 *McWilliams v. Sir William Arrol & Co.* [1962] 1 WLR 295. (The deceased's widow failed to discharge this burden on the facts.)

C. Omissions as cause

5/99 It is a mistake to think that only positive acts (»making things happen«) can operate as causes, and hence give rise to liability, and that »doing nothing« can bring nothing about. In fact, the terms »act« and »omission« should properly be regarded as nothing more than labels that can be applied interchangeably to every instance of human conduct; the distinction does not reflect any deep, philosophical subdivision of human conduct into two essentially different types. The point is well-made by *Hart* and *Honoré*: »Human conduct can be described alternatively in terms of acts or omissions. ›A medical man who diagnoses a case of measles as a case of scarlet fever may be said to have omitted to make a correct diagnosis; he may equally well be said to have made an incorrect diagnosis‹ (*Harnett v. Bond* [1924] 2 KB 517, 541 per Bankes LJ). Sometimes it is more appropriate to describe the conduct as an omission; if there is a legal duty to do an act, and the subject has not done it, the legally relevant description will be in terms of an omission to perform the act in question. But the description of conduct as an omission may not imply any bodily movements by the person whose conduct is in question: eg if the description is: ›The defendant failed to inspect the electrical wiring.‹ Consequently those courts and writers who are impressed by ›setting in motion‹ as a prime instance of causation, and who further conclude that we can only set things in motion by ourselves making movements, find it difficult to understand how an omission to act can negative causal connection. It is now thought, at least in England, that there is no special difficulty about omissions … In truth, no rational distinction can be drawn between the causal status of acts and omissions.«[207]

D. Cumulative causation

5/100 In cases of toxic exposure attributable to emissions from both D1 and D2, and in analogous cases, it is immaterial that V's injury would have occurred even if the exposure from either D1 or D2 was taken away. That is, it is not necessary to prove that either D1 or D2 was a but-for cause. It is necessary to prove only that D1 and/or D2 made a material contribution to the exposure, from which is inferred a material contribution to V's injury[208]. Thus, where V contracts pneumoconiosis as a result of the gradual build-up in his lungs of silicone dust to which he is exposed in separate periods of employment with D1 and D2, and the exposure from D1 would

207 *Hart/Honoré*, Causation in the Law² 138 f.

208 *Bonnington Castings Ltd. v. Wardlaw* [1956] AC 613; *Bailey v. Ministry of Defence* [2008] EWCA Civ 883, [2009] 1 WLR 1052.

probably have caused the pneumoconiosis without the contribution from D2, D2 is not a but-for cause of the condition. Nevertheless, he is liable for it on the basis that his more than trivial contribution to the cumulative exposure constitutes a material contribution to the injury[209]. The same applies where V suffers serious injuries in a road traffic accident attributable to the negligence of D1, leaving her in a weakened state which is subsequently exacerbated by her negligent treatment in D2's hospital; because of her weakened state, V aspirates her own vomit, which results in hypoxic brain damage. Both D1 and D2 made a material contribution to this injury, even if it could not be proven that D2 made any difference to the outcome[210].

5/101 The quantum of liability in such cases depends on whether the injury suffered by V is divisible or indivisible. If the injury is divisible (as where it is a progressive condition that develops in proportion to V's toxic exposure), each D is liable only to the extent of his proportional contribution to the total exposure[211]. If the injury is indivisible, each defendant is jointly and severally liable in the full amount of V's loss[212].

E. Overlapping causation

5/102 D1 and D2 injure V independently and consecutively, and the effects of the two injuries overlap. Consequently, neither D1 nor D2 satisfies the but-for test in respect of the area of overlap (»the overlap injury«). Whichever of them is hypothetically imagined away, the other would have caused the overlap injury anyway. Here English law's approach is captured in a set of three principles, all of which attach significance to the order in which the injuries occur. To provide a complete picture, it is necessary to consider not just multiple tortfeasors but also the case of overlap between tortious and non-tortious injury.

5/103 First, where the effects of a tortious injury are overlapped by the effects of some later non-tortious injury, the tortfeasor's liability in damages is extinguished from the time the non-tortious injury would have had the same effect. The award of damages should not place V in a better position than he would have been in had the tort not occurred[213]. Consider the following illustration. V injures his back in an accident at work for which his employer, D, is responsible. He is left fit for only light work, and so suffers a reduction in earnings. Subsequently, V suffers spinal

209 A variation on the facts of *Bonnington Castings Ltd. v. Wardlaw* [1956] AC 613.
210 A variation on the facts of *Bailey v. Ministry of Defence* [2008] EWCA Civ 883, [2009] 1 WLR 1052.
211 See eg *Holtby v. Brigham & Cowan (Hull) Ltd.* [2000] 3 All ER 421 (asbestosis; damages assessed on a »time-exposure« basis).
212 *Bailey v. Ministry of Defence*, above.
213 *Jobling v. Associated Dairies* [1982] AC 794.

disease which renders him totally unfit for work (and would have done so regardless of the initial injury). D is clearly liable for the reduction of earnings until the disease would have caused the same degree of disability, but does D's liability extend to the period after that date? Applying the principle just stated, D's liability ceases when the spinal disease would have mimicked the effect of the work accident, and does not extend to any later period[214].

5/104 Secondly, where the effects of a tortious injury caused by D1 are overlapped by the effects of some later tortious injury caused by D2, D1's liability is not extinguished by D2's injury[215]. Otherwise V might »fall between two tortfeasors« in the sense that the aggregate of the awards against D1 and D2 might be less than the total loss suffered[216]. By way of illustration, consider a case where V is run down by D1's motor vehicle, injuring his leg with residual loss of mobility. Some time later, he is shot in the same leg by D2 in the course of an armed robbery, and the leg has to be amputated. V consequently suffers a further loss of mobility, which is clearly D2's responsibility. D1 clearly has to pay for the initial loss of mobility to the date of the shooting injury. But is it D1 or D2, or neither of them, who has to pay for the initial loss of mobility for the period after the shooting? Applying the principle just stated, it is D1 (not D2) who has to pay for the initial loss of mobility for the period after the shooting[217].

5/105 So far, only the liability of the first tortfeasor (D1) has been addressed. The position as regards the second tortfeasor (D2) is that he is entitled to »take his victim as he finds him« and is therefore liable only for the additional injury, if any, that he causes V[218]. So, where V's motor vehicle is involved in the space of a few weeks in two collisions caused by D1 and D2 respectively, and either collision on its own would have necessitated a respray of the car it falls to D1 to pay for the cost of the respray; D2 does not have to pay for what V already needed[219].

F. Alternative causation

5/106 Where either D1 or D2 injured V, but it is not certain which of them was in fact causally responsible, V must normally prove that the defendant he chooses to sue was more likely than not the cause of his injury. The classic illustration in English law is a case where V drinks tea from a urn at his workplace which, unknownst to him, has been poisoned with arsenic by persons unknown. Experiencing persis-

214 *Jobling v. Associated Dairies* [1982] AC 794.
215 *Baker v. Willoughby* [1970] AC 467.
216 *Jobling v. Associated Dairies* [1982] AC 794, 815 per Lord Keith.
217 *Baker v. Willoughby* [1970] AC 467.
218 *Performance Cars v. Abraham* [1962] 1 QB 33.
219 *Performance Cars v. Abraham* [1962] 1 QB 33.

tent vomiting, V goes to the casualty department of D's hospital. The duty doctor refuses to see him and V dies from arsenical poisoning. The doctor's refusal to see V is not a cause in fact of his death as there was little or no chance that effective treatment could have been given in time anyway, so D is not liable[220].

5/107 Courts in various common law jurisdictions have over time admitted a number of exceptions to the but-for test in various cases of alternative causation. Liability has thus been imposed in the hunters' scenario in Canada[221] and in cases of mesothelioma from asbestos exposure in England[222]. Where V sustains mesothelioma through occupational exposure to asbestos dust during separate periods of employment with D1 and D2, and it is unknown whether mesothelioma is triggered by exposure to asbestos on a single occasion or by cumulative exposure over a period of time, D1 and D2 are both liable to compensate V in proportion to their contribution to the total risk. This liability for »material contribution to risk« was first explicitly recognised in *Fairchild v. Glenhaven Funeral Services Ltd.* in 2002. It is not limited to cases of mesothelioma or to cases where all the possible causes of the injury are tortious (the »indeterminate defendant« scenario) but can apply even when the possible causes include non-tortious factors, including V's own conduct[223]. But the courts have repeatedly emphasised that the liability must be regarded as exceptional[224]. The limits of the exception are, however, unclear and little attempt has been made to date to explain how it fits with English law's consistent rejection of claims for loss of chance[225], even though the chance of avoiding injury is simply the obverse of the risk of suffering injury[226].

5/108 As regards the quantum of liability, the traditional rule of joint and several liability is applied in the hunters' cases, but proportional liability has been the preferred judicial approach in the mesothelioma scenario[227]. In the leading, English

220 *Barnett v. Chelsea and Kensington Hospital Management* [1969] 1 QB 428. On the facts, the identity of D1 was unknown and the proceedings were only against D2.

221 *Cook v. Lewis* [1951] Supreme Court Reports (SCR) 830 (Supreme Court of Canada); see also *Summers v. Tice* (1948) 33 California Reports, Second Series (Cal 2d) 80, 199 Pacific Reporter (P) 2d 1 (California Supreme Court).

222 *Fairchild v. Glenhaven Funeral Services Ltd.* [2002] UKHL 22, [2003] 1 AC 32; *Barker v. Corus (UK) plc* [2006] UKHL 20, [2006] 2 AC 572. The House of Lords explicitly followed the approach of the California Supreme Court in *Rutherford v. Owens-Illinois Inc.* (1997) 67 California Reporter (Cal Rptr) 2d 16, though that was a claim against a manufacturer of asbestos rather than an employer.

223 See *McGhee v. National Coal Board* [1973] 1 WLR 1 (non-tortious workplace exposure to noxious brick dust) and *Barker v. Corus*, above (asbestos exposure in periods of self-employment), where Lord Hoffmann at [13] described *McGhee* as a case of *Fairchild* liability »avant la lettre«.

224 See eg *Barker v. Corus,* at [1] per Lord Hoffman, and [57] per Lord Scott.

225 *Hotson v. East Berkshire Area Health Authority* [1987] AC 750; *Gregg v. Scott* [2005] UKHL 2, [2005] 2 AC 176.

226 *G. O. Robinson*, Probabilistic Causation and Compensation for Tortious Risk (1985) 14 Journal of Legal Studies (J Legal Stud) 779, 793.

227 *Rutherford v. Owens-Illinois Inc.* (1997) 67 Cal Rptr 2d 16 (California Supreme Court); *Barker v. Corus* (House of Lords).

case, the House of Lords explained that it was immaterial that mesothelioma was an indivisible injury because the basis of the liability in such cases was the wrongful creation of the risk or chance of mesothelioma[228]. Consistency of approach suggested that each defendant's liability should therefore be proportionate to the risk he or she had created. Considerations of fairness also pointed to this conclusion as the favour allowed to the claimant in admitting an exception to the but-for test created a potential injustice to the defendant, which could be »smoothed« by limiting the liability arising to a proportionate-share of the total loss[229].

5/109 By Compensation Act 2006, sec 3 joint and several liability is restored for mesothelioma cases but not other cases falling with the »*Fairchild* exception«. A perhaps unintended consequence of the new provision is that an employer can be liable for the whole of the claimant's loss even where the asbestos exposure attributable to him was much less than attributable to the general environment[230].

5/110 »Market-share liability« is so far recognised only in a minority of US states, and has not yet received judicial acceptance in England or other Commonwealth countries.

5/111 I recently undertook a survey of the differences between English and Austrian approaches to alternative causation, reaching the following conclusions[231]. Both systems are prepared to dispense with the ordinary requirements relating to proof of causation in (some) cases of uncertain alternative causation – and not just in the case of alternative defendants, but also where there is alternative causation with contingency. Both systems also have recourse, in some such cases, to proportional liability. But there are some significant differences. In particular, the Austrian approach to alternative causation rests on a general theory (potential causation)[232], while the English approach is to make a largely un-theorised exception to ordinary rules. Conversely, adoption of proportional liability in England and Wales is in one way more comprehensive, because it is applied there to the indeterminate defendant scenario as well as to cases of alternative causation where one or more of the possible causes is non-tortious. A further difference is in how the liability is conceived: under Austrian law, as a weakening of the ordinary requirement of conditio sine qua non, and under English law as a redefinition of the damage in terms of the risk rather than the outcome. Of crucial importance to understanding the difficulty that English law has had in formulating a principled ap-

228 *Barker v. Corus*, at [35] ff per Lord Hoffmann. Lord Scott and Lord Walker expressly agreed with Lord Hoffmann's analysis. Cf Baroness Hale at [120], expressly rejecting this analysis.

229 *Barker v. Corus*, at [43] per Lord Hoffmann.

230 *Sienkiewicz v. Greif (UK) Ltd.* [2011] UKSC 10, where 15 % of the total exposure was tortious and 85 % environmental.

231 *K. Oliphant*, Alternative Causation: A Comparative Analysis of Austrian and English Law, in: Festschrift für Helmut Koziol (2010) 810 ff.

232 Basic Questions I, nos 1/27, 5/78 ff.

proach in this area is the established standard of proof – the balance of probabilities – which has to be displaced if proportional liability is to be applied, whereas, where a standard of (very) high probability or near certainty is applied, proportional liability can operate within the framework provided by the rules on proof, inasmuch as there exists an intermediate zone between the probability necessary to prove causation, and the probability necessary to disprove causation were the burden of proof to be reversed. It is here that proportional liability might conceivably be employed – without amending the normal standard of proof. Where the standard of proof is the preponderance of evidence, there is no similar intermediate zone, so the recognition of proportional liability would entail the displacement – at least in a category of cases – of the normal standard[233].

G. Damages for loss of chance[234]

5/112 To understand English law's approach to the award of damages for loss of chance, an initial distinction must be drawn between what must be proven to establish a cause of action, and the quantification of damages in respect of a proven cause of action. At the quantification stage, percentage chance assessments are routinely and correctly made by the courts. So where a 19-year-old student suffered brain damage in a road accident and was awarded damages for loss of earnings, the Court of Appeal proceeded on the assumption that she had a 50:50 chance of qualifying and obtaining employment in her preferred career (drama teaching) and awarded her damages for that loss of chance[235]. However, such cases are not cases of »loss of chance proper« because they deal with the quantification of damages, rather than whether loss of chance is itself to be treated as an actionable injury[236].

5/113 In general, English tort law sets itself against the award of damages for loss of chance in this true sense. Reliance upon the loss of chance theory is seen as an impermissible way of getting around normal limitations on the scope of tortious liability and generally applicable requirements of proof. To establish a cause of action, it is normally necessary to prove each of its elements on the balance of prob-

233 *Oliphant* in: Koziol-FS 811 f.

234 *K. Oliphant*, Loss of Chance in English Law (2008) 16 European Review of Private Law (ERPL) 1061, especially at 1068 ff. For other analyses, see *A. Burrows*, Uncertainty: Damages for Loss of a Chance [2008] Journal of Personal Injury Litigation (JPIL) 31; *H. McGregor*, Loss of chance: where has it come from and where is it going? (2008) 24 Professional Negligence (PN) 2; *J. Stapleton,* Cause in fact and the scope of liability for consequences (2003) 119 Law Quarterly Review (LQR) 388, 389–411.

235 *Doyle v. Wallace* [1998] PIQR Q146. See also *Langford v. Hebran* [2001] EWCA Civ 361, [2001] PIQR Q13 (loss of chance of career in professional kick-boxing).

236 See further *McGregor* (2008) 24 PN 2, 5 f, but note the criticism of the cause of action/quantification distinction by *Burrows* [2008] JPIL 31, 42 f.

abilities. Once the balance of probabilities is tipped, the law treats any evidential uncertainty as resolved and no discount is made to the damages to reflect the possibility that things might have happened otherwise. If the court finds there was a 75 % chance that A injured B by his negligence, B is entitled to full damages for his injury, not full damages discounted by 25 %. Conversely, if the claimant fails to tip the balance of probabilities, he fails to establish his cause of action and his claim fails altogether. So if there was only a 25 % chance that A injured B by his negligence, B is entitled to nothing by way of damages, not 25 % of the notional full award.

5/114 As English law concerns itself mainly with liability for physical harms, and liability for non-physical harms (eg pure economic loss) is exceptional, the claimant must normally prove a physical injury resulting from the defendant's wrongdoing, and is not allowed to reformulate his claim as one for loss of a chance that has no physical existence[237]. Liability for loss of chance is recognised, however, in those exceptional cases where pure economic loss is sufficient to establish a cause of action because losing the chance of financial gain is itself an economic loss[238]. The claimant establishes his cause of action by showing on the balance of probabilities that he lost that chance as a result of the defendant's wrongdoing. The court then proceeds to the quantification of damages, which (in accordance with normal principles) reflects percentage-chance assessments of what would have happened but for the tort. So the claimant complaining that his solicitor has negligently allowed the time limit to expire on his compensation claim, suffers an actionable loss at the date on which the claim is extinguished, and the damages payable will be proportional to the claimant's now purely hypothetical chances of success in the time-barred action.

5/115 If liability is to be recognised in a true case of lost chance in connection with a physical injury, it must be by way of exception to the basic principles set out above. In fact, the possibility of such an exception was acknowledged by *Lord Bridge* in *Hotson*, and divided the House of Lords in *Gregg v. Scott*, with (it seems) two Law Lords in favour, two against, and one reserving his opinion. In what type of case might a loss of chance argument succeed, however, if it was rejected on the actual facts of both the leading cases? To answer this question, it is necessary to identify three distinct situations. In the first, (a), the claimant's condition has resolved at the time of the defendant's negligence, but it is uncertain whether or not he had at that stage any chance of avoiding the injury. This was the situation in *Hotson*. The

237 This was in effect what the House of Lords decided in the *Hotson* case.

238 See eg *Gregg v. Scott* [2005] 2 AC 176 at [220] per Baroness Hale. Cf [83] per Lord Hoffmann (in financial loss of chance cases, »the chance can itself plausibly be characterised as an item of property, like a lottery ticket«). See further *B. Coote*, Chance and the Burden of Proof in Contract and Tort (1988) 62 ALJ 761.

uncertainty is purely evidential, not inherent in the claimant's condition. In such a case, the claimant must prove on the balance of probabilities that he retained the chance of avoiding the injury at the relevant time. In the second situation, (b), the claimant's condition at the time of the negligence is known, but there is uncertainty how his condition will develop subsequently and/or how he will respond to the treatment he receives. This uncertainty continues at the date of trial. This was the situation in *Gregg v. Scott*. As the risk of injury has not yet materialised, and may never do so, the claimant's action for damages cannot succeed. Lastly, in case (c), we come to the situation that has yet to come before the Law Lords. As in (b), the claimant's condition at the time of the negligence is known but there is uncertainty inherent in his condition and/or the treatment he receives. But, unlike case (b), the risk of injury has materialised and the uncertainty has therefore been resolved. This would have been the situation in *Gregg v. Scott* if the claimant had died before trial. It is submitted that, in this rather narrow category of cases, there remains scope in English law for recognition of liability for loss of chance, though it is far from certain that the courts will take such a step when the opportunity arises. Nevertheless, they have shown themselves willing to embrace innovative solutions to problems of causal indeterminacy in other contexts in recent times[239], and the possibility of further innovation cannot be ruled out entirely.

239 See, especially, *Fairchild v. Glenhaven Funeral Services Ltd.* [2003] 1 AC 32.

Part 6 The elements of liability

I. Introductory remarks

Departing slightly from *Koziol's* terminology, I would entitle this section »grounds of liability« as this formulation indicates that the inquiry is into alternative bases on which a person may be liable for damage suffered by another. It is thus to be preferred to the phrase »elements of liability«, which suggests a list of items that are *necessary* components of a claim. That is not the case as regards the items considered below. **5/116**

II. Wrongfulness

A. Damnum sine iniuria

»The world is full of harm for which the law furnishes no remedy.«[240] A person may sustain loss or damage and yet possess no remedy in tort, because his legal rights have not been infringed in any way which the law regards as wrongful, with the result that he has suffered nothing that amounts in law to an injury[241]. This doctrine is embodied in the Latin phrase *damnum absque iniuria.* An entrepreneur can compete freely against a trade rival, provided he stays within the law, even if his strategy is to drive the rival out of business[242]. At common law, a landowner incurs no liability for erecting a structure on his land that spoils the pleasant view previously enjoyed by his neighbour[243]. Nor is there any liability for seducing another person's husband, wife or partner. It may also be noted in this context that no damages can be awarded in English law for a person's death per se[244] or for a person's expectation of death in consequence of personal injury (as opposed to pain and suffering caused by awareness of a reduction in life expectancy)[245]. **5/117**

240 *D v. East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 37, at [100] per Lord Rodger of Earlsferry.
241 See also *Day v. Brownrigg* (1878) 10 Ch D 294, 304 per Jessel MR; *Mayor of Bradford v. Pickles* [1895] AC 587, 601 per Lord Macnaghten.
242 *Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.* [1892] AC 25.
243 *Bland v. Moseley* (unreported, 1587).
244 *Admiralty Commissioners v. Owners of Steamship Amerika* [1917] AC 38.
245 Administration of Justice Act 1982, sec 1.

B. What makes the infliction of harm wrongful?

5/118 There is no general answer to the question, what makes the infliction of harm wrongful in English law, other than to say (tautologously) that the harm must occur in circumstances where the elements of a tortious cause of action are present. From this perspective, fault is regarded as an aspect of wrongfulness, and English lawyers quite frequently treat the two ideas as interchangeable. But, properly understood, there are aspects of wrongfulness that go beyond whether or not there was fault on the facts. For example, in the area of the economic torts, it is not enough for the claimant to show that the defendant intentionally caused him economic loss, for liability only arises if the defendant procures the violation of a right (eg under a contract) that the claimant enjoyed independently or used independently unlawful means (eg intimidating threats) to cause that loss[246]. And, to establish the general liability for negligence, it must be shown that the harm was inflicted in breach of a duty of care owed by the defendant to the claimant. This focuses partly on the defendant's conduct, asking was it negligent with regard to the claimant, but the assessment whether or not the defendant owed the claimant any duty of care, and whether or not any duty that was owed extended to the harm the claimant suffered, has regard to all the circumstances of the case, including the harm actually sustained. Ultimately, the court must exercise its judgment whether, in the light of the foreseeability of the harm and the proximity of the relationship between the parties, it is fair, just and reasonable to impose on the defendant a duty of care[247].

C. A de minimis rule

5/119 Additionally, English law applies a *de minimis rule* whereby unwanted physical changes in the claimant's person or property are treated as actionable damage only if they reach a given threshold. For example, where a group of claimants developed pleural plaques (fibrous tissues on the membrane of the lung) in consequence of their exposure to asbestos, it was ruled that this did not constitute actionable damage. Although pleural plaques are an indicator of an enhanced risk of developing other asbestos-related conditions in the future (eg asbestosis or mesothelioma), the plaques were not harmful in themselves and would not themselves cause the development of those other conditions[248].

246 See generally *K. Oliphant*, Economic Torts, in: idem, The Law of Tort² (2007) 1533.
247 *Caparo Industries plc v. Dickman* [1990] 2 AC 605.
248 *Rothwell v. Chemical & Insulating Co. Ltd. Re Pleural Plaques Litigation* [2007] UKHL 39, [2008] 1 AC 281.

D. Omissions

5/120 The common law's starting point is that there is in general no liability for omissions or, to put it another way, that there is no duty to engage in affirmative actions to prevent the occurrence of harm to another. It is not enough to trigger such a duty that another person is threatened by a risk of serious harm that the defendant could easily avert, or even that this would be for the general good[249]. The approach seems restrictive in comparison with that taken in most European legal systems[250] but is supported as the most effective way of maximising individuals' freedom of action, which would be imperilled if burdensome affirmative duties were to be imposed on them[251]. Another justification for the general rule of no liability is the pragmatic concern that there may be no reason for holding any particular defendant liable for harm he could have prevented rather than all those other persons who were just as able to intervene[252].

5/121 By way of exception to the general rule, however, it may be recognised that a duty of affirmative action arises on particular facts. There is no definitive list of the circumstances that give rise to such a duty, but the following categories are recognised in the literature: the defendant's prior creation of a source of danger (even if entirely without fault); the defendant's undertaking of responsibility for the claimant's welfare[253]; the defendant's occupation of an office or position of responsibility (eg as the claimant's parent or employer)[254]; and the ownership or occupation of land[255].

249 *Sutradhar v. National Environment Research Council* [2006] 4 All ER 490, where the House of Lords ruled that a British Government-sponsored survey of drinking water quality in Bangladesh did not entail a duty of care on the scientists to the population of that country such as to found liability for a major environmental disaster involving the contamination of drinking water with arsenic, which put millions of Bangladeshis at risk.

250 Basic Questions I, no 6/45.

251 *J.C. Smith/P. Burns*, *Donoghue v. Stevenson* – The Not So Golden Anniversary (1983) 46 MLR 147.

252 *Stovin v. Wise* [1996] AC 923, 944 per Lord Hoffmann.

253 See eg *Kent v. Griffiths* [2001] QB 36 (ambulance service). However, a fire brigade that answers an emergency call does not assume any responsibility towards the person whose property is on fire, because that might conflict with the brigade's responsibility to the public generally: *Capital & Counties plc v. Hampshire County Council* [1997] QB 1004. Indeed, the fire bridge does not even have any duty merely *to answer* the call (ibidem).

254 See eg *Barnes v. Hampshire County Council* [1969] 1 WLR 1563 (school teacher's duty to small child under her supervision).

255 By statute, the occupier of land owes a duty of care in respect of dangers arising from things done *or omitted to be done* on the land: Occupiers' Liability Act 1957 (visitors); Occupiers' Liability Act 1984 (non-visitors).

E. Pure economic loss

5/122 English law adopts a general »no recovery« or »exclusionary« rule for pure economic loss. The approach is ascribed, variously[256], to the fear that liability might extend to an indeterminate class of claimants, in an indeterminate amount, thereby imposing an undue burden upon the defendant[257], the lesser value of economic interests relative to interests in the person or property[258], the consideration that many pure economic losses are not social costs, but simply involve the transfer of wealth from one party to another[259], a belief that economic losses are more effectively distributed throughout society if they are left to lie where they fall rather than being concentrated on the defendant[260], a belief that economic *risks* are more effectively distributed throughout society if this is left to negotiated risk-allocations by the parties involved[261], and the absence of any right to make economic gains that can be regarded as infringed if the defendant is caused an economic loss[262].

5/123 The approach applies not just in cases where the economic loss suffered is entirely independent of personal injury or property damage, but also where it is suffered only because of injury to person[263] or property[264] of another (»relational economic loss«). A statutory exception is allowed by the Fatal Accidents Act 1976 in respect of claims for loss of dependency on another person's death, though the claim is open only to a prescribed class of dependants, including ascendants, descendants, spouses and (subject to conditions) unmarried partners.

5/124 A less drastic approach applies to the intentional infliction of economic loss, though the law stops short of basing liability simply on the intention to cause economic harm or the unfairness of the conduct. Instead it is necessary to show that the loss resulted from the infringement of the claimant's (contractual or other) right[265] or from the defendant's use of independently unlawful means to cause the harm[266].

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256 For a critical overview, see *Canadian National Railway Co. v. Norsk Pacific Steamship Co.* [1992] 1 SCR 1021, 1147 ff per McLachlan J.

257 *Hedley Byrne & Co. v. Heller & Partners Ltd.* [1964] AC 465, 536 f per Lord Pearce; *Spartan Steel and Alloys Ltd. v. Martin & Co. Ltd.* [1973] QB 27, 38 per Lord Denning.

258 *Canadian National Railway Co. v. Norsk Pacific Steamship Co.* [1992] 1 SCR 1021, 1158 ff per McLachlan J (*dubitante*).

259 *W. Bishop*, Economic Loss in Tort (1982) 2 Oxford Journal of Legal Studies (OJLS) 1.

260 *Spartan Steel and Alloys Ltd. v. Martin & Co. Ltd.* [1973] QB 27, 38 per Lord Denning.

261 *C. Witting*, Distinguishing between Property Damage and Pure Economic Loss in Negligence: A Personality Thesis (2001) 21 LS 481.

262 *Beever*, Rediscovering the Law of Negligence 232 f; *R. Stevens*, Torts and Rights 21.

263 *West Bromwich Albion FC Ltd. v. El Safty* [2006] EWCA Civ 1299, [2007] PIQR P7.

264 *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.* [1973] QB 27.

265 *Lumley v. Gye* (1853) 2 Ellis & Blackburn's Queen's Bench Reports (E & B) 216.

266 *OBG Ltd. v. Allan* [2008] 1 AC 1.

5/125 Liability for the negligent infliction of pure economic loss may arise where the defendant has (extra-contractually) assumed responsibility towards the claimant[267] and in certain other, as yet narrowly-confined situations that cluster around this central case[268]. A more expansive approach is followed in some Commonwealth jurisdictions, especially in connection with relational economic loss[269] and costs attributable to defects in acquired property[270].

5/126 This is an area in which the English courts, in particular, have been accused of proceeding in a rather unprincipled manner, on the basis of analogies with established pockets of liability rather than convincing legal arguments. In a series of articles, *Stapleton* has consequently suggested that the »pockets« approach should be replaced with an agenda of policy concerns that the courts should expressly take into account: (a) the absence or controllability of the threat of indeterminate liability; (b) the inadequacy of alternative means of protection; (c) that the area is not one more appropriate to Parliamentary action and; (d) that a duty would not allow a circumvention of a positive arrangement regarding allocation of risk which had been accepted by the plaintiff[271]. The approach advocated seems to bear some resemblance to the »10 commandments of liability for economic loss« proposed by *Koziol* in his Basic Questions[272].

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267 *Hedley Byrne & Co. v. Heller & Partners Ltd.* [1964] AC 465.

268 See eg *Smith v. Eric S. Bush* [1990] AC 831 (valuation carried out for building society; liability to homebuyer); *Spring v. Guardian Assurance* [1995] 2 AC 296 (unfavourable employment reference); *White v. Jones* [1995] 2 AC 207 (negligence in preparing a will; liability to intended beneficiary).

269 Australia: *Perre v. Apand Pty Ltd.* (1999) 198 Commonwealth Law Reports (CLR) 180. Canada: *Canadian National Railway Co. v. Norsk Pacific Steamship Co.* [1992] 1 SCR 1021.

270 Australia: *Bryan v. Maloney* (1995) 182 CLR 609; New Zealand: *Invercargill C.C. v. Hamlin* [1994] 3 New Zealand Law Reports (NZLR) 13; Canada: *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.* (1995) 121 Dominion Law Reports (DLR) (4th) 193 (liability limited to costs of remedying dangerous defects). Cf the English cases of *D. & F. Estates v. Church Comrs* [1989] AC 177; *Murphy v. Brentwood D.C.* [1991] 1 AC 398.

271 *J. Stapleton*, Duty of Care and Economic Loss: A Wider Agenda (1991) 107 LQR 249; *J. Stapleton*, Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence (1995) 111 LQR 301; *J. Stapleton*, Duty of Care Factors: A Selection from the Judicial Menus, in: P. Cane/J. Stapleton (eds), The Law of Obligations: Essays in Celebration of John Fleming (1998). See also *P. Giliker*, Revisiting Pure Economic Loss: Lessons to be Learnt from the Supreme Court of Canada (2005) 25 LS 49.

272 Basic Questions I, no 6/62 ff.

III. Fault

A. On fault in general

5/127 Except in torts requiring proof of intentional conduct, »fault« in English law may generally be equated with negligence, using that term to refer to a means by which a tort may be committed rather than as the independent tort of that name. The classic definition is that provided by *Baron Alderson* in *Blyth v. Birmingham Waterworks Co.* in 1856: »Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do«[273].

5/128 It is clear from *Alderson's* reference to the reasonable man that English law takes an objective approach to the question of what constitutes fault. It »eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question«[274]. It makes no allowance for the defendant's lack of the skill, ability, knowledge or expertise expected of those engaging in the activity in question, even though the defendant is a learner[275] – and even though every skill has to be acquired through learning and practice at some time. Instead, the calculation is whether (as conventionally formulated) the risk attributable to the defendant was unreasonable having regard to the probability of its eventuation, the gravity of the likely harm if it should eventuate, the costs to the defendant of taking precautions to eliminate or reduce the risk, and the social value of the activity undertaken (if any) – all these factors being assessed from the standpoint of a reasonable person in the defendant's situation[276]. All other considerations being equal, more care must therefore be taken in activities that are especially likely to cause harm, or that risk very significant harm, even if that risk is unlikely to eventuate.

5/129 As *Honoré* has noted, the effect of such an approach is the imposition of strict liability, that is liability without (moral) fault, in cases where the defendant is physically or mentally unable to reach the standards of the reasonable person[277]. He defends these outcomes, however, by reference to his theory of »outcome responsibility« in which he maintains that the imposition of liability without moral fault may be justifiable as a means of reinforcing the moral responsibility of the individual for his actions and their consequences; to accept a lack of skill or experience as defences would undermine the legal subject's status as a morally

273 (1856) 11 Exchequer Reports (Ex) 781, 784.
274 *Glasgow Corporation v. Muir* [1943] AC 448, 457 per Lord Macmillan.
275 *Nettleship v. Weston* [1971] 2 QB 691 (learner driver).
276 *M. Lunney/K. Oliphant*, Tort Law: Text & Materials[5] (2013) chapter 4.
277 *T. Honoré*, Responsibility and Luck (1988) 104 LQR 530.

responsible agent because it would mean that the ability to take reasonable care of the interests of others could no longer be regarded as an essential aspect of legal personality. On his account, it is only those who cannot ordinarily be expected to meet this basic standard of conduct who should be exempted from it.

B. Children[278]

5/130 There is in English law no fixed minimum age which must be attained before a child can be held liable in tort[279], but it is a general requirement of tortious liability that the defendant's act be shown to be »voluntary«[280], which seems to require a certain capacity for voluntary action that may not be present in a very small child[281]. This seems to bear some resemblance to the position in other systems where the possession of necessary powers of discernment is a prerequisite for a finding of fault[282], but it should be noted that a finding that the defendant acted involuntarily excludes liability for all torts, including torts of strict liability, at least where these are based on the defendant's own conduct, and not merely for torts based on fault.

5/131 With older children, the question is simply whether the defendant, whatever his age, satisfied the requirements of the tort in question – for example, whether the child intended or foresaw the consequences of his actions, or whether he satisfied the required standard of care. This is the standard of an ordinarily prudent and reasonable child of the defendant's age[283]. The child's age may thus be material in assessing whether or not the claimant's injury was foreseeable as a »real risk« of the defendant's conduct[284] and also in determining what precautions the defendant could reasonably have been expected to take against the risk of injury[285].

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278 See generally *K. Oliphant*, Children as Tortfeasors under English Law, in: M. Martín-Casals (ed), Children in Tort Law, vol 1: Children as Tortfeasors (2006). In principle, the approach taken as regards children could also be applied to persons of advanced years, though I am not aware of substantial jurisprudence or academic discussion of the issue.

279 Cf the contrary approach adopted by most courts in the United States: see Prosser on Torts[5] 180.

280 *Smith v. Stone* (1647) Style's King's Bench Reports (Style) 65, 82 ER 533; *Public Transport Commission v. Perry* (1977) 137 CLR 107.

281 *Tillander v. Gosselin* [1967] 1 The Ontario Reports (OR) 203, Ontario High Court (3-year-old boy). The issue seems not to have been raised in any decided English case.

282 Basic Questions I, no 6/76 ff.

283 *Mullin v. Richards* [1998] 1 WLR 1304. See also *Staley v. Suffolk County Council*, 26 November 1985, unreported. In *Gorely v. Codd* [1967] 1 WLR 19, another negligent shooting case, Nield J. found liable a 16-year-old defendant with learning difficulties without considering what standard of care was appropriate.

284 Ibidem.

285 Cf *Goldman v. Hargrave* [1967] 1 AC 645 (adult's physical capacity to be taken into account).

5/132 There is no formal rule whereby children are held to a higher standard of care if they engage in »adult activities«[286]. However, the care demanded of a child is effectively the same as that demanded of an adult in certain circumstances where the child engages in an adult activity. A 17-year-old motorist undoubtedly owes the same duty of care as an adult motorist[287] and it has been submitted that even a child of under 17, who is unable to drive lawfully on a public road by reason of his age, may properly be held to the same standard if it chooses to drive (whether on a public road or not) and has sufficient understanding of the need for care[288]. It should be noted that the standard of care remains that of an ordinarily prudent and reasonable child of the defendant's age; it is simply that the steps necessary to discharge the duty are the same as those required of an adult. A different result may well be warranted where the child is impelled to undertake an adult activity by force of circumstance – for example, where a child is left in a parked car whose handbrake fails, causing it to roll downhill, and the child attempts unsuccessfully to steer the car around a hazard before bringing it to a stop.

IV. Liability for other persons and for things

5/133 Liability for other persons and for things is normally based on the defendant's personal fault – for example, the failure to supervise a young child[289] or leaving horses unattended[290]. Vicarious liability renders an employer liable for a tort committed by an employee within the scope of the latter's employment: this liability is independent of any personal fault by the employer, but (in the usual case) requires fault on the part of the employee. The justifications for this liability are much debated, but it is generally accepted that they rest on a combination of different considerations, including efficient loss distribution, providing a just and practical remedy to prevent the injured person going uncompensated and, insofar as the employer chooses whom to employ and has control over what is done,

286 The contrary approach has been adopted by courts in the United States: see Prosser on Torts[5] 181-2.

287 See *Tauranga Electric-Power Board v. Karora Kohu* [1939] NZLR 1040 (New Zealand Court of Appeal): 17-year-old cyclist.

288 *A. Mullis/K. Oliphant*, Torts[4] (2011) 110 (example of a 15-year-old tearaway who hot-rods a motorcar and drives away). See also *McEllistrum v. Etches* (1956) 6 DLR (2d) 1 and *McErlean v. Sarel* (1987) 61 OR (2d) 396 (both Ontario Court of Appeal).

289 *Carmarthenshire C.C. v. Lewis* [1955] AC 549.

290 *Haynes v. Harwood* [1935] 1 KB 146.

deterring future harm[291]. Vicarious liability, however, does not apply to parents for the torts of their children, or to persons who commission others to help them with particular tasks, whether gratuitously or for reward[292]. However, where the defendant authorises another person to do something that constitutes a tort, or combines with another person for a common purpose, and the latter commits a tort effecting that purpose, the defendant may be liable as a joint tortfeasor – even though not at fault, and even though he has not caused the harm that results.

5/134 At common law, there was no liability independent of fault in respect of things under one's control other than dangerous animals (for which liability is now governed by statute)[293]. Statutory strict liability for defective products was imposed on their producer and (within limits) their supplier by the Consumer Protection Act 1987, pursuant to the European Directive.

V. Strict liability for dangerous activities

5/135 Under the famous rule in *Rylands v. Fletcher*[294], a person who conducts exceptionally hazardous activities on his land is liable to his neighbour if the hazard escapes and does damage to the latter's property. The rule has been subjected to so many limitations[295] – many of them apparently expressing a desire to restrict the scope of liability without fault by whatever means possible – that it has become a practical irrelevance. The English courts have so far declined to abolish the rule[296], but in Australia it has been incorporated within the general law of negligence as based on a species of »non-delegable duty«[297].

5/136 English law is almost unique in the European context in maintaining a fault-based approach to liability for road traffic accidents. Though it is sometimes said that such a high standard of care is applied as to produce almost the same outcomes as would result in a strict liability system[298], my own impression is that this is not the case, though it is difficult to think what sort of evidence would be required to make a scientific judgement on the matter.

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291 *G. Williams*, Vicarious Liability and the Master's Indemnity (1957) 20 MLR 220; *P.S. Atiyah*, Vicarious Liability (1967); *Bazley v. Curry* (1999) 174 DLR (4th) 45 (Supreme Court of Canada. »Fairness« in this context is based on notions of enterprise responsibility [ibidem]).

292 *Morgans v. Launchberry* [1973] AC 127.

293 Animals Act 1971.

294 (1866) LR 1 Exch 265, (1868) LR 3 HL 330.

295 See *Oliphant*, Enterprise Liability.

296 See *Transco plc v. Stockport Metropolitan B.C.* [2004] 2 AC 1.

297 *Burnie Port Authority v. General Jones Pty Ltd.* (1994) 179 CLR 520.

298 Basic Questions I, no 6/145.

VI. Permitted interference

5/137 The common law does not recognise a liability for harm resulting from an activity done with statutory authority[299]. However, a mere planning permission does not carry the same weight, and does not act as a defence against tortious liability, though its grant may be relevant in assessing whether the ordinary requirements of the tort are made out[300]. As noted above (no 5/39 ff), a person may be allowed to continue a tortious course of conduct if the court, in the exercise of its discretion, declines to prohibit it by injunction. In such circumstances, there is a statutory power to award damages for the future interference the person affected will suffer. But this is a liability for wrongful conduct that is *tolerated* rather than a liability for conduct that is actually permitted.

VII. Other considerations

5/138 Perhaps because the scope of (true) strict liability in English law is so narrow, factors like the economic capacity to bear the burden, the realisation of profit, the availability of insurance, and the concept of a risk community, do not feature significantly in the legal discourse. Discussion of them is mainly limited to such contexts as vicarious liability[301] and product liability[302].

VIII. Contributory conduct of the victim

5/139 Until 1945, the victim's contributory negligence was a complete defence to tortious liability. This rule came to be regarded as unduly harsh, and its effects were mitigated by various devices applied in aid by the courts, until finally the law was reformed by statute in 1945[303]. Under the Act, if the claimant[304] is guilty of contributory negligence, the court has a discretion to reduce the damages awarded

299 *London, Brighton and South Coast Rly v. Truman* (1886) 11 AC 45.

300 *Gillingham B.C. v. Medway (Chatham) Dock Co. Ltd.* [1993] QB 343; *Wheeler v. J.J. Saunders Ltd.* [1996] Ch 19.

301 See eg *D. Brodie*, Enterprise Liability and the Common Law (2010).

302 See eg *J. Stapleton*, Product Liability (1994).

303 Law Reform (Contributory Negligence) Act 1945.

304 Or a person whose negligent contribution to the injury is attributed to the claimant, eg in circumstances where, had another person been injured, the claimant would have been vicariously liable: *C. Sappideen/P. Vines*, Fleming's The Law of Torts[10] (2011) paras 12.220 and 12.230.

to such an extent as it thinks just and equitable having regard to the claimant's share in the responsibility for the damage. The word »share« used in the statute prevents the claimant being found 100 % contributorily negligent, but a claimant who shows a reckless disregard for his own safety may be regarded as having voluntarily assumed the risk of harm and so to be disentitled from compensation for it: *volenti non fit iniuria*[305].

5/140 In principle, the same approach applies to children. Just as there is no fixed minimum age for children to be liable, neither is there any fixed minimum age below which, as a matter of law, a child is deemed to be incapable of contributory negligence. Whether or not a very young child is guilty of contributory negligence is a question of fact to be assessed in the circumstances of the individual case[306]. Still it is doubtless true, as a practical matter, that »[a] very young child cannot be guilty of contributory negligence«[307]. In 1978, a Royal Commission proposed a statutory rule prescribing that children under 12 should never have their damages reduced for contributory negligence when injured by a motor vehicle, submitting that this broadly reflected the existing practice of the courts[308], but the proposal was never enacted.

305 *Morris v. Murray* [1991] 2 QB 6.
306 *Speirs v. Gorman* [1966] NZLR 897, 902 per Hardie Boys J.
307 *Gough v. Thorne* [1966] 1 WLR 1387, 1390 per Lord Denning.
308 *Pearson Report* (FN 50) vol 1, § 1077.

Part 7 Limitations of liability

I. The basic problem of excessive liability

5/141 Fear of excessive liability – as evidenced by the frequent invocation of the famous »floodgates argument« – has been an abiding concern of English tort law for centuries[309]. On occasion, it has been expressly relied upon by the courts as a reason for declining to recognise that a duty of care arises in particular circumstances – perhaps most notably in connection with psychiatric injuries[310]. Sceptics, however, argue that the force of the floodgates argument has been greatly exaggerated[311].

5/142 Quite apart from the ad hoc reliance upon policy considerations to restrict the scope of the duty of care, the courts have a number of other concepts that may be employed in order to limit the scope of tortious liability. Though sometimes obscured by its extensive use of metaphor, the common law's approach to the restriction of what would otherwise be excessive liability fits the pattern that one finds in most systems of supplementing the basic requirement of *conditio sine qua non* with additional limitations on liability, some (but not all) of which have traditionally been regarded as causal. The principal examples of such limitations in the common law are the principles of *novus actus interveniens* and remoteness of damage, which play a role that is functionally equivalent (in broad terms) to principles of adequacy in other systems[312]. The common law principles (and, one suspects, principles of adequacy in other systems) are broad-textured and allow the tribunal of fact considerable discretion in their application. They determine in some cases whether liability falls on a single tortfeasor or on two or more, and so reflect to some extent a legal system's general orientation towards either individualised corrective justice (as in the case of the common law, at least in England) or the loss distribution which is accorded greater weight in some other systems.

309 See eg *Winterbottom v. Wright* (1842) 10 Meeson & Welsby's Exchequer Reports (M & W) 109, 115 per Alderson B. (»if we go one step beyond that, there is no reason why we should not go fifty«).

310 See eg *McLoughlin v. O'Brian* [1983] AC 410, 421 f per Lord Wilberforce.

311 See eg *McLoughlin v. O'Brian* [1983] AC 410, 442 per Lord Bridge.

312 For general analysis, see *J. Spier/O.A. Haazen*, Comparative Conclusions on Causation, in: J. Spier (ed), Unification of Tort Law: Causation (2000) 127 ff, 130 ff.

II. Interruption of the causal link

5/143 Where both D1 and D2 are factual causes of V's injury, D1 is not liable for the injury if D2's intervention negates legal causation between D1 and the injury – that is, if it »breaks the chain of causation« and so constitute a *novus actus interveniens*. In such a case, only D2 is liable for the injury. A pair of illustrations may be given. First, D1 causes flooding of V's home, which has to be vacated during repairs, and D2 (a squatter) enters the vacant property and causes additional damage. D1 cannot be said to have caused the additional damage, and so is not liable for it, because D2's intervention was »novus actus interveniens«[313]. Secondly, V, a police motorcyclist, is injured in the aftermath of an accident caused by D1 at the exit from an underground carriageway; D2, the police officer in charge, orders V to ride against the flow of traffic to close the tunnel at its entrance; V is struck by an oncoming motorist who is driving without negligence. The sole legal cause of V's injury is D2, even though it would not have occurred without D1[314].

5/144 According to the influential thesis of *Hart* and *Honoré*[315], this process of selection from among causally relevant factors is appropriately termed »causal« because it reflects distinctions made consistently – not only in the law but also in other areas of discourse, including ordinary speech – between »mere conditions« and »the cause« of an event. Responsibility is thus attributed (not on every occasion and not exclusively, of course) on causal grounds. The metaphor of a »break« in causation indicates an intervention in the normal course of events. *Hart* and *Honoré's* detailed and subtle analysis leads them to suggest that legal causation between a factual cause of an injury and the injury itself is liable to be negatived if the injury results from an intervention that is deliberate and itself intended to cause the harm, or constitutes an abnormal and unexpected occurrence or conjunction of events. As already noted, the thesis has been attacked on the basis it introduces policy considerations into what should be a purely factual concept[316]. Nevertheless, it has attracted a measure of judicial support in the English courts and been said to reflect »the individualist philosophy of the common law«[317].

313 *Lamb v. Camden London Borough Council* [1981] QB 625. Aliter in circumstances where D1 has a duty to control D2: see eg *Home Office v. Dorset Yacht Co. Ltd.* [1970] AC 1004 (damage caused by escapees from young offenders' institution).

314 *Knightly v. Johns* [1982] 1 WLR 349.

315 See *idem*, Causation in the Law[2].

316 No 5/95 above.

317 *Reeves v. Commissioner of Police for the Metropolis* [2000] 1 AC 360, 368 per Lord Hoffmann.

III. Remoteness of damage

5/145 By the rule established in the Privy Council's *Wagon Mound* decision[318], liability is further restricted to harm that is of a type that was the reasonably foreseeable consequence of the defendant's tort. The most convincing justification for the limitation is the need to provide some mechanism – even if somewhat rough and ready – to keep liability within reasonable bounds, rather than any spurious equation of the issues of culpability and the extent of compensation by which foreseeability, as crucial to determining the former, is for that reason used as the test of the latter[319]. The limitation applies to most claims in tort, but not to claims based on intentional wrongdoing, in which the defendant may be liable for all losses directly flowing from the wrong[320].

5/146 It is sometimes argued that the principle of remoteness of damage is simply a cover for the concealed policy choices of judges, but most commentators reject this, even though they are driven to accept that the traditional risk theory, which asks whether the risk of the type of harm in suit was reasonably foreseeable, leaves much to judicial discretion in determining the relevant risk. To render the process of determination more transparent, *Stauch* has persuasively suggested that, rather than define the risk in terms of *what* damage was sustained, as is traditional, we should do so in terms of *how* it occurred (the »revised risk theory«). His focus is on the set of causal conditions necessary for the occurrence of the injury, and in particular upon those conditions which, added to the defendant's conduct, completed the relevant causal set. The question for the court is thus whether the possible completion of that causal set was a reason for regarding the defendant's conduct as a breach of duty. If not, the injury is prima facie too remote. *Stauch* submits that his is capable of withstanding the accusation that determinations of remoteness are entirely subjective or policy-driven. He concedes, however, that it may be legitimate to depart from the standard test for reasons of policy (eg in the »thin-skull« scenario), so long as the circumstances in which this is permitted are regarded as exceptional and limited in scope[321].

318 *Overseas Tankship (UK) Ltd. v. Morts Dock & Engineering Co. Ltd., The Wagon Mound* [1961] AC 388.
319 Fleming's The Law of Torts[10] para 9.160.
320 *Smith New Court Securities Ltd. v. Citibank NA* [1997] AC 254.
321 *M. Stauch*, Risk and Remoteness of Damage in Negligence (2001) 64 MLR 191 [*K. Oliphant* in: H. Koziol/B.C. Steininger (eds), European Tort Law 2001 (2002) 131, no 103].

IV. The protective purpose of the rule infringed

5/147 In determining whether breach of a statute gives rise to a cause of action in a person damaged by it, it must be established that the rule infringed was intended to protect persons in the class to which the claimant belongs from the type of harm that he suffered. One begins by asking what was the »mischief« that the statute was designed to prevent. In the leading case, the claimant sought damages for the loss of a number of sheep that the defendant shipowner had contracted to carry after the sheep were washed overboard during heavy weather. He relied upon the failure to comply with an order made under the Contagious Diseases (Animals) Act 1869 which required the sheep to be transported in secure pens. However, the court found that the Act was not passed with the purpose of protecting owners of livestock from having their animals washed overboard but merely for sanitary purposes, in order to prevent animals in a state of infectious disease from communicating it to other animals with which they might come in contact. As the damage complained of fell outside the objects of the statute, the claim could not be maintained[322].

5/148 It must also be shown that the claimant was a member of the class that the statute sought to protect, and it has been found, for example, that a regulation intended to ensure safe working conditions could not be the basis of a cause of action in favour of a fire officer called to the workplace[323], and that the duty to keep the gates of a level-crossing in the proper position was passed in order to protect members of the public using the road, not the train driver[324].

5/149 Similar reasoning is also employed in negligence cases at common law when it comes to defining the scope of persons and the type of harm covered by the defendant's duty of care. Thus, it has been decided, for example, that a property valuer must take care to supply correct information, and can be liable for the consequences of the information being correct, but does not undertake to protect the purchaser from fluctuations in the market value of the property acquired, so cannot be liable to the extent that the purchaser's loss on a transaction entered into on the basis of a negligent valuation was increased by a general fall in the property market[325]. Likewise, the scope of a doctor's duty of care in performing a sterilisation operation is to protect the woman from becoming pregnant but not to preserve

322 *Gorris v. Scott* (1874) LR 9 Exch 125. For a more recent example, see *Fytche v. Wincanton Logistics plc* [2004] UKHL 31, [2004] 4 All ER 221 (steel-toe-capped boots adequate for the intended purpose of protecting against the falling heavy objects, even if they did not protect against frostbite).

323 *Hartley v. Mayoh & Co.* [1954] 1 QB 383.

324 *Knapp v. Railway Executive* [1949] 2 All ER 508.

325 *South Australia Asset Management Corp. v. York Montague Ltd.* [1997] AC 191.

the family finances from the costs of raising the child born at the conclusion of the pregnancy[326]. As the latter is evidently the foreseeable consequence of the former, it is clear that policy considerations play a large role here.

326 *McFarlane v. Tayside Health Board* [2000] 2 AC 59.

Part 8 Compensation of the damage

I. On compensation in general

In English law, compensation is effected in money. There is no concept of restitution in kind, though the issue of a mandatory injunction may have the effect of restoring the claimant's pre-tort position in practical terms. Nevertheless, the court seeks – so far as a monetary award is able to – to put the claimant in the position he would have been in if no tort had occurred. In principle, the claimant is entitled to a full indemnity for all aspects of his loss, both pecuniary and non-pecuniary, even if the best the law can do as regards the latter is to make an award that is fair, rather than truly replacing what was lost. Normally quantum is for the judge, within the parameters established by previous cases, but, where a child is killed tortiously, a sum fixed by statute (currently £ 11,800) is paid to the parents by way of bereavement[327]. **5/150**

The basic measure of damages in a case of damage to goods is the goods' diminution in value, which is usually calculated by reference to market prices. Though the cost of repair may provide a good indication of the diminution in value in ordinary cases, the claimant is not able to recover the full repair costs if these significantly exceed the value of the damaged item and it would not be reasonable to have the repairs effected[328]. Exceptionally, repairs may be found to be reasonable even though their cost significantly exceeds the value of the thing repaired[329]. An item's subjective value may be taken into account, for example, where there is no relevant market by reference to which its value may be assessed, or only a market (eg in scrap metal) that would significantly under-represent its use-value to its owner[330]. **5/151**

Exceptionally the amount that may be recovered is capped by statute[331] or, as under the legislation enacting the Product Liability Directive, subject to a threshold[332]. But there is no general reduction clause in English law or, so far as I am **5/152**

327 Fatal Accidents Act 1976, sec 1A.

328 *Darbishire v. Warran* [1963] 1 WLR 1067.

329 *O'Grady v. Westminster Scaffolding Ltd.* [1962] 2 Lloyd's Law Reports (Lloyd's Rep) 238 (unique motorcar that could not be replaced).

330 See eg *The Harmonides* [1903] Law Reports Probate (P) 1; *A. Tettenborn* (ed), The Law of Damages (2003) § 14.30.

331 See eg Carriage by Air Act 1961, sec 4 (capping the carrier's liabilities by reference to the amounts specified in the Warsaw and Montreal Conventions); Nuclear Installations Act 1965, sec 16(1) (capping the strict liability arising under the Act at £ 140 million).

332 Consumer Protection Act 1987, sec 5(4) (£ 275 threshold in respect of property damage).

aware, in any other common law system[333]. Neither does English law make provision for the (complete or partial) release of an employee from liability even in circumstances where vicarious liability arises[334]; indeed, in strict law the employer is entitled to recover an indemnity from an employee for whose tort he is obliged to pay damages on the basis of vicarious liability[335]. However, industry-wide agreements preclude this in practice in the overwhelming majority of cases[336].

5/153 The award of damages normally includes interest to compensate the claimant for being deprived of the use of the money between the time of injury and settlement or judgment. Special damages usually carry interest at half the short-term investment rate from the date of the accident. General damages awarded in respect of non-pecuniary loss carry interest at 2 % from the date of service of the writ[337]. No interest at all is awarded on general damages in respect of future pecuniary loss.

II. Periodic or lump sum

5/154 In the common law, damages were traditionally recoverable once only and awarded as a lump sum. Historically, this approach was justified on a number of grounds: the need for finality in litigation, the desirability of giving the plaintiff a free choice how to spend the damages, and the avoidance of the administrative costs entailed by periodic payments[338]. The lump-sum approach meant that, where the claimant's loss was continuing, the court had to anticipate all that the future held in store and adjust the damages awarded accordingly. In personal injury cases, it has been said that this approach gave rise to »insuperable problems«: »The award, which covers past, present and future injury and loss, must, under our law, be of a lump sum assessed at the conclusion of the legal process. The award is final; it is not susceptible to review as the future unfolds, substituting fact for estimate. Knowledge of the future being denied to mankind, so much of the award as is to be attributed to future loss and suffering (in many cases the major part of the award) will almost surely be wrong. There is really only one certainty: the future will prove the award to be either too high or too low«[339].

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333 Cf Basic Questions I, no 8/24 ff.
334 Cf Basic Questions I, no 8/6.
335 *Lister v. Romford Ice and Cold Storage Co. Ltd.* [1957] AC 555.
336 *R. Lewis*, Insurers' Agreements not to Enforce Strict Legal Rights: Bargaining with Government and in the Shadow of the Law (1985) 48 MLR 275.
337 See *Birkett v. Hayes* [1982] 1 WLR 816.
338 *Pearson Report* (FN 50) vol 1, § 560 ff.
339 *Lim Poh Choo v. Camden & Islington Area Health Authority* [1980] AC 174, 182-3 per Lord Scarman.

A first attempt to address these problems was effected by the introduction in 1982 of »provisional damages« whereby damages are initially awarded on the assumption a specified deterioration in health will not occur, but the claimant is allowed to return to court for further damages if it does in fact occur[340]. But this was only a limited step, that remained tied to the lump-sum method, and parties sought informally to provide a periodic income for the injured claimant by developing what came to be known as »structured settlements«. Eventually, though perhaps surprisingly recently, a judicial power to impose a »periodic payment order« was introduced[341]. It is believed that periodical payments are better able to reflect the claimant's actual needs and losses and remove many of the risks associated with lump sums, while relieving the claimant of the burden of managing a large investment[342]. It is also an advantage of periodical payments that they more accurately correspond with what the injured person has lost, which is generally a periodic income. **5/155**

340 Senior Courts Act 1981, sec 32A (as amended by Administration of Justice Act 1982, sec 6).

341 Courts Act 2003.

342 *Lord Chancellor's Department,* Consultation Paper. Damages for Future Loss: Giving the Courts the Power to Order Periodical Payments for Future Loss and Care Costs in Personal Injury Cases (2002).

Part 9 Prescription of compensation claims

I. The current law

5/156 The ordinary limitation period, as English lawyers call it, is three years for personal injury[343], and six years for all other actions in tort (unless specifically provided)[344]. The shorter period for personal injury claims reflects a perception that there is a particular need to ensure the speedy trial of such actions while evidence is fresh in the minds of the parties and witnesses[345]. Time starts to run when the injury, damage or loss occurs or was reasonably discoverable[346]. An overriding time limit of 15 years from the date of the negligence or the damage (whichever is the later) applies in respect of latent damage not involving personal injuries[347]. The court has a discretion to allow a claim to proceed out of time in the case of personal injuries and death[348], but not otherwise. In actions in respect of defective products, the court cannot override the prescribed time limit where the damages claimed by the claimant are confined to damages for loss of or damage to property[349], or (in any case) the overriding time limit of ten years from the time the defendant supplied the product to another (or other relevant time)[350]. It may also be noted that a special time limit of one year is normally prescribed for actions brought in defamation and malicious falsehood[351].

II. Commencement of the prescription period

5/157 The prescription period generally runs from when the cause of action accrues. For torts which are actionable without proof of damage, such as trespass and libel, this is the date of the tortious act. Where the tort is committed only if damage is

343 Limitation Act 1980, sec 11(4).
344 Limitation Act 1980, sec 2.
345 Report of the Committee on The Limitation of Actions (1949) Cmd 7740, para 22.
346 Limitation Act 1980, secs 11(4), 14 and 14A.
347 Limitation Act 1980, sec 14B.
348 Limitation Act 1980, sec 33.
349 Limitation Act 1980, sec 33(1A)(b).
350 Limitation Act 1980, secs 11A(3), 33(1A)(a).
351 Limitation Act 1980, secs 4A, 32A. Special rules also apply to tort claims in respect of successive conversions (sec 3), theft (sec 4) and protection from harassment (sec 11[1A]).

proved, as in the tort of negligence, the cause of action accrues from the date of the damage[352].

5/158 In a negligence action in which facts relevant to the cause of action are not known on the date on which it accrues, an alternative three-year limitation period applies[353]. This runs from the earliest date on which the claimant first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action. »Knowledge« includes knowledge which the person might reasonably have been expected to acquire from facts observable or ascertainable by him[354]. A different regime applies in respect of personal injury claims, in respect of which »knowledge« refers (inter alia) to knowledge that the injury in question was significant, and that it was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty, and as to the identity of the defendant[355]. The »significance« requirement is whether the claimant would reasonably have considered the injury sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment. In the ever more frequently occurring context of claims in respect of childhood sexual abuse, significance should not be assessed simply in the light of the immediate effects of childhood sexual abuse, but with regard to what the action is all about, which may well be long-term, post-traumatic, psychiatric injury[356].

5/159 In the case of injury to a child, time runs from the date on which the claimant attains the age of majority (18)[357]. Where the defendant has deliberately concealed any fact relevant to the claimant's right of action, time does not begin to run until the claimant has discovered that concealment[358].

III. Reform proposals

5/160 In a report issued in 2001, the Law Commission found that the current regime of limitation is unduly complex, sometimes unclear and produces unfairness[359]. It recommended a simplified regime in which there would be a primary limitation period of three years starting from the date on which the claimant knows, or ought

352 *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners* [1983] 2 AC 1.
353 Limitation Act 1980, sec 14A (added by Latent Damage Act 1986, sec 1).
354 Limitation Act 1980, sec 14A(10).
355 Limitation Act 1980, sec 14(1).
356 *KR v. Bryn Alyn Community (Holdings) Ltd.* [2003] QB 1441.
357 Limitation Act 1980, secs 28 and 38(2).
358 Limitation Act 1980, sec 32(1).
359 *Law Commission*, Limitation of Actions (Law Com No 270, 2001).

reasonably to know: (a) the facts which give rise to the cause of action; (b) the identity of the defendant; and (c) if the claimant has suffered injury, loss or damage or the defendant has received a benefit, that the injury, loss, damage or benefit was significant. There would also be a secondary »long-stop« limitation period of 10 years, starting from the date of the act or omission which gives rise to the cause of action. The Law Commission expressly acknowledged that this might result in the loss of the right to sue even before the claimant's cause of action came into being, but thought this necessary in order to protect defendants from claims being brought so long after the events to which the claim relates that defendants are no longer properly able to defend themselves, and to place some limit on their need to insure themselves against liability, while compensating them for the loss of certainty which is inherent in the adoption of a limitation regime dependent on the date of knowledge of the relevant facts by the claimant[360]. For claims in tort where loss is not an essential element of the cause of action, the date from which the long-stop period runs is the date on which the cause of action accrues. For claims in respect of personal injuries, the court would have a discretion to disapply the primary limitation period and no long-stop limitation period would apply other than in respect of product liability claims brought under the EC Directive.

5/161 These proposals have not yet been enacted.

360 Ibidem para 3.99 ff.

United States of America

Michael D. Green • W. Jonathan Cardi

Basic Questions of Tort Law from the Perspective of the USA

Chapter 6

Basic Questions of Tort Law from the Perspective of the USA

Michael D. Green/W. Jonathan Cardi

Preliminary remarks

I. General introduction

A. The source of American tort law

The American legal system is derived from English law. Thus, in the United States, tort law is fundamentally an area of law in which courts make, develop and reform the law. While English substantive law influenced American law at the outset, much of tort law developed in the latter part of the 19th century after American courts were established and functioning[1]. Tort law is found predominantly in judicial opinions, and courts use those opinions as the source of law, as prescribed by the principle of stare decisis. While courts thus »make law«, they do so by way of decisions in individual cases that then are applied in subsequent cases. Courts must decide only the issues presented by the facts of the case before them and, in doing so, they do not engage in the sort of general and prospective lawmaking in which legislatures engage. Thus, while a court may decide to reject contributory negligence and employ instead comparative negligence, it would not then attend to the many consequential issues that must be addressed once a regime of com- **6/1**

1 Thus, for example, American courts did not follow what appeared to be a broad rule of strict liability protecting landowners from harm caused by substances that escaped from their neighbors' property, established in *Rylands v. Fletcher* [1868] Law Reports (L.R.) 3 House of Lords (H.L.) 330. See *Losee v. Buchanan,* 51 New York Reports (N.Y.) (1873) 476 (rejecting use of strict liability for claim in which harm was caused to neighbor by exploding steam boiler).

parative negligence is adopted. Those matters would be left to future development as they arise in cases and are presented to courts. Similarly, a court would not prescribe a threshold amount that must be satisfied before a tort victim would have a claim – those sorts of arbitrary determinations are thought the role of legislative law not the common law.

6/2 Notwithstanding the hegemony of courts in developing tort law in the U.S., legislatures throughout the states have, since the late 1960s, enacted »tort reform« statutes designed to address a perceived problem with the operation of a variety of aspects of tort law. Typical reform legislation addresses damages: capping awards on non-pecuniary losses, imposing limits on the recovery of punitive damages, and changing the collateral source rule. Joint and several liability has been substantially modified such that it is no longer a majority rule in the U.S.[2]

B. The role of the jury

6/3 At the same time, juries play a major role in civil cases in the United States. The right to a jury in civil cases is ensconced in the Seventh Amendment to the federal Constitution[3], and virtually all states have a comparable provision applicable to courts in that state. Thus, any party to a tort suit has a constitutional right to have a jury decide the facts of the case. Not only do juries decide the historical facts that are in dispute, but juries are also assigned mixed questions of fact and law, such as negligence[4], intent, and scope of liability[5]. The existence of and reliance on juries has had a major impact on the development of tort law in the United States[6].

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2 For a comprehensive cataloguing of state tort reform, see <http://www.atra.org/legislation/states>.

3 In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law. U.S. Constitution Amendment VII; see also *C.W. Wolfram,* The Constitutional History of the Seventh Amendment, 57 Minnesota Law Review (1973) 639, 653 (explaining and documenting the U.S. commitment to civil jury that existed in the late 18th century).

4 Unlike many European legal systems, in the United States, fault, wrongdoing, and negligence are collapsed together even though negligence is determined from an objective perspective. This is just one of many pragmatic features of U.S. tort law.

5 Courts for over a century have referred to this element of a tort action as proximate cause. Because of confusion over the use of »proximate« as well as »cause«, the Third Restatement of Torts adopted »scope of liability« terminology, and we follow that usage in this United States Response.

6 See *M.D. Green,* The Impact of the Civil Jury on American Tort Law, 38 Pepperdine Law Review (Pepp. L. Rev.) (2011) 337; see also *M.D. Green,* The Impact of the Jury on American Tort Law, in: H. Koziol/B.C. Steininger (eds), European Tort Law 2005 (2006) 55. The following discussion on the respective roles of judge and jury in the U.S. tort system is drawn from these articles.

This use of juries has created tension in the development of U.S. tort law. *Oliver Wendell Holmes* in The Common Law[7], often credited as the most important work in the intellectual history of tort law, provided four criteria for dividing the work between judge and jury: **6/4**

1. »Standards of conduct are for judges to set forth, while historical facts are for the jury;
2. However, negligence or breach of duty is submitted to the jury, even when the doubt is about the appropriate standard of care rather than the facts;
3. Nevertheless, submission to the jury is not required and when a ›state of facts often repeated in practice‹ exists, judges should set forth the appropriate standard of care, leaving to juries only the question of historical fact;
4. Setting forth those specific standards of care would further an important function of law: ›narrow[ing] the field of uncertainty‹.«[8]

Holmes's vision for tort law was put into play in 1927 in *Baltimore & Ohio Railroad v. Goodman*[9]. *Goodman* involved a railroad crossing accident in which the plaintiff was injured while driving over railroad tracks, when defendant's train hit him. Defendant asserted that the plaintiff was contributorily negligent in crossing the tracks. Although this appeared to be a case in which maxim two was operative, and the jury would decide the matter, *Holmes* invoked principle three: »When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him«[10], he must take precautions, including stopping and getting out of his vehicle if unable to determine whether a train is bearing down on him. Not only did the adoption of a specific standard narrow uncertainty by providing a rule of law rather than a jury verdict having no precedential value, specific legal standards address the respective role of judge and jury, displacing the jury and leaving for the court a determination that, as it was in *Goodman,* is dispositive on the question of liability. The narrow rule that required stopping and departing from the vehicle limited the relevant facts to the point that there was no dispute of historical fact and no issue about whether the legal standard was satisfied. Depending on how often judges found repeated patterns and invoked *Holmes's* dictum to provide a specific rule of law, *Goodman* could have produced a system in which juries played a considerably subdued role in tort cases. **6/5**

Seven years later, *Benjamin Cardozo* had replaced *Holmes* on the Supreme Court (two other justices had also been replaced) and, in another railroad cross- **6/6**

7 *O.W. Holmes,* The Common Law (1881).
8 See *G.E. White,* Justice Oliver Wendell Holmes (1993) 161 ff (citing *Holmes,* Common Law 123–128).
9 275 United States Supreme Court Reports (U.S.) (1927) 66.
10 275 U.S. (1927) 69 f.

ing case, *Pokora v. Wabash Railway Co.*[11], the Court effectively overruled *Goodman,* declaring that exiting the car and reconnoitering was not required of a driver crossing railroad tracks in all cases. Not only was the *Goodman* rule out of touch with ordinary behavior (as any jury would appreciate, *Cardozo* might have added), but different circumstances prevailing at a railroad crossing may require different precautions[12]. Thus, *Cardozo* imbued in determinations of negligence what the Third Restatement characterizes as »an ethics of particularism, ... which requires that actual moral judgments be based on the circumstances of each individual situation.«[13]

6/7 With a general »reasonable care« standard owed to the entire world, the jury would be empowered to decide cases, unencumbered by the normative views of the judge as to the appropriate standard of conduct. It is common wisdom that the *Cardozo* view of jury hegemony won out and that the American tort system reflects that view[14]. Thus, *Richard Posner,* a prominent U.S. judge and former law professor, observed recently that while contract law has a number of constraints to limit jury authority: »Tort law does not have these screens against the vagaries of the jury.«[15]

6/8 But tort law in the United States has not proceeded in that vein. Rather numerous substantive doctrines and adjectival principles have developed that have prevented what might otherwise have been a free-wheeling, jury-dominated tort system[16].

6/9 The most important substantive doctrine reflecting the tension over judge-jury authority is a robust duty doctrine that affords courts the opportunity, frequently invoked, to screen individual cases in which, based on the facts of the particular case, they believe that liability should not be imposed[17]. By contrast, Continental European legal systems have very weak notions of duty operating in

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11 292 U.S. (1934) 98.

12 See 292 U.S. (1934) 105 f.

13 Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 8, cmt c.

14 See *F. Fleming, Jr.,* Functions of Judge and Jury in Negligence Cases, 58 The Yale Law Journal (Yale L.J.) (1949) 667, 676 (»On the whole the rules of accident law are so formulated as to give the jury considerable scope in deciding what the parties should have done, in each specific case, as well as what they did do. The cardinal concept is that of the reasonably prudent man under the circumstances ...«); *R.M. Nixon,* Changing Rules of Liability in Automobile Accident Litigation, 3 Law & Contemporary Problems (Law & Contemp. Probs.) (1936) 476, 479.

15 *All Tech. Telecom. Inc. v. Amway Corp.,* 174 Federal Reporter, Third Series (F.3d) 862, 866 (7th Cir. 1999).

16 See *J. Stapleton,* Benefits of Comparative Tort Reasoning: Lost in Translation, 1 Journal of Tort Law (2007) 6, 14.

17 See *W.J. Cardi/M.D. Green,* Duty Wars, 81 Southern California Law Review (S. Cal. L. Rev.) (2008) 671; *D.A. Esper/G.C. Keating,* Abusing »Duty«, 79 S. Cal. L. Rev. (2006) 265; *J.C.P. Goldberg/B. Zipursky,* The Restatement (Third) and the Place of Duty in Negligence Law, 54 Vanderbilt Law Review (Vand. L. Rev.) (2001) 657.

tort law[18], and England's duty doctrine is a holdover from when it had civil juries[19]. Numerous additional aspects of United States law reflect this tension in the allocation of decisional authority between judge and jury, which has no relevance to Germanic or other Continental European tort systems[20].

C. The federal system of law making

6/10 While the federal legislature has supreme lawmaking authority in those spheres in which it has authority, tort law (along with contract and property law) has been left to individual states – no broad federal laws govern tort law in the United States[21]. As a result, tort law is not uniform throughout the U.S. While there are pockets of considerable variation, such as joint and several liability and the professional rescuer rule, a common core exists on many basic principles and even on many specific issues. The American Law Institute, which was founded in 1923 to address uncertainty and confusion that existed in American common law[22], has contributed to that common core through its Restatements in common law areas. Throughout this response, we attempt to reflect mainstream U.S. law as best we understand it and identify, where useful, areas of divergence.

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18 The Principles of European Tort Law (PETL) do not mention duty in the realm of personal injury claims. But cf *European Group on Tort Law,* Principles of European Tort Law. Text and Commentary (2005) art 4:103 (addressing affirmative obligations to protect as a »duty to act positively«). Chapter 5 of Basic Questions I, which explains the »basic criteria for a compensation claim«, does not contain »duty« as an element for tort claims (Basic Questions I, no 5/1 ff).

19 England does retain juries, on a discretionary basis, for a handful of tort actions, among them defamation, malicious prosecution, and false imprisonment. See *Lord Scott of Foscote/Justice R.J. Holland/C.D. Varner,* The Role of »Extra-Compensatory« Damages for Violations of Fundamental Human Rights in the United Kingdom & the United States, 46 Virginia Journal of International Law (2006) 475, 490 f.

20 See *Green,* 38 Pepp. L. Rev. (2011) 337.

21 To be sure, the federal Congress has enacted many laws that affect the operation of tort law in the states, sometimes supplementing, replacing, or displacing state tort law. For example, after a major oil spill off of the coast of Alaska, Congress enacted the Oil Pollution Act of 1990, 33 United States Code (U.S.C.) § 2701 ff which addresses the liability of oil polluters, including to private parties who suffer harm as a result of an oil spill. Over the past 20 years, the U.S. Supreme Court has repeatedly found in federal regulatory legislation an express or implied preemption of state tort law. This preemption has ranged from cigarette warnings to fungicides and herbicides to generic drug warnings. When federal preemption exists, state law is barred from operating, leaving injured victims with no recourse in tort law.

22 See *American Law Institute,* About A.L.I. – A.L.I. Overview <http://ali.org/index.cfm?fuseaction=about.creation> (last visited 11.10.2012).

D. The structure and goal of this response

6/11 We have read and carefully considered the entirety of Basic Questions I. In this U.S. response, we have responded to much of what is contained in Basic Questions I, especially when we thought that U.S. tort might be helpful to a reader considering commonalities and differences among different countries in their treatment of the issues addressed in Basic Questions I. That selection and the content of this report is unavoidably influenced by the views of the authors. We also found ourselves frequently expressing our views in response to theories and arguments contained in Basic Questions I that are not addressed in U.S. tort law to our knowledge. Even for areas in which there is scholarly discussion (and often disagreement), we have favored the side that we find more compelling rather than loading this report with all perspectives on a given area. The reader will find substantial reliance on the *Third Restatement of Torts* both because it represents a considered synthesis of tort law in the U.S. today and because one of the authors of this Report was a co-reporter for substantial portions of the Third Restatement.

6/12 We wish, in advance, to apologize for one aspect of this U.S. response. Because we have no facility with German (or other Continental European languages), we were unable to dig deeper into matters raised in Basic Questions I through the sources cited therein. On too many occasions our understanding of principles, doctrine, and analysis contained in Basic Questions I would have been much improved were it not for our foreign language handicap.

II. Organizational matters

6/13 American tort lawyers would be bemused with the organization of Basic Questions I. Tort law in the United States tends to be organized in one of two ways: 1) by the type of conduct required for liability (eg, negligence, strict liability or intent); and 2) the interest protected (eg, bodily injury or reputation). Thus, the most prominent contemporary treatise on U.S. tort law begins with a section containing several chapters on intentional torts involving bodily injury, personal property and real property and then proceeds with a similar section on negligently inflicted harm to the same interests[23]. Similarly, a leading torts casebook begins with the negligence claim for personal injury and in later separate chapters, claims based on strict liability and intentional torts, as well as claims based purely on economic, emotional, and other non-physical harms[24].

23 *D.B. Dobbs/P.T. Hayden/E.M. Bublick,* The Law of Torts[2] (2011).

24 See *M.A. Franklin/R.L. Rabin/M.D. Green,* Tort Law and Alternatives: Cases and Materials[9] (2011).

By contrast, Basic Questions I begins, after an introductory chapter, with rem- **6/14**
edies[25]. In the course of that wide-ranging chapter, considerable attention is paid to injunctions – a most rare remedy in tort law in the U.S. – coordinating first-party insurance and social security with tort damages, and the separate, yet overlapping, functions of tort and criminal law. The core chapter on the elements of a claim, Chapter 5, does not distinguish among claim for harms to different interests, instead setting forth issues applicable to all claims. While key tort concepts, such as causation, scope of liability, and affirmative duties are set forth in the recent Third Restatement of Torts, that Restatement is limited to tort claims involving harm to persons or property, implicitly acknowledging that those principles may be modified if claims involving different interests are asserted[26].

We also note that the U.S. makes a greater distinction between tort law and **6/15**
contract law than in countries with a Germanic tradition of law. »The Law of Obligations« is not a common phrase in U.S. law, and students are taught in separate courses with separate texts and separate professors the law of contract and the law of tort. While tort and contract overlap in the U.S. as well[27] and compete for dominance in those areas, recognition of that tension does not detract from their independence in the eyes of U.S. law.

25 Basic Questions I, no 2/1 ff.

26 Thus, for example, the Third Restatement has distinct provisions for scope of liability depending on whether the claim is one based on negligence or an intentional tort even if the same interest is implicated. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) §§ 29, 33.

27 For example in the areas of products liability and in express waivers of liability. See eg *M.A. Geistfeld,* Principles of Products Liability (2005) 29–40 (explaining the doctrinal difficulties arising from the fact that some products liability claims are by purchaser/consumers while others are by bystanders).

Part 1 Introduction

I. The victim's own risk

6/16 The central concept in this section[28] – that losses should be borne by the victim unless there is good reason to shift the loss – and the reasons for it were expressed by *Holmes* in The Common Law: »The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune. ... If this were not so, any act would be sufficient, however remote, which set in motion or opened the door for a series of physical sequences ending in damage; such as riding the horse, in the case of the runaway, or even coming to a place where one is seized with a fit and strikes the plaintiff in an unconscious spasm. Nay, why need the defendant have acted at all, and why is it not enough that his existence has been at the expense of the plaintiff? The requirement of an act is the requirement that the defendant should have made a choice. But the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability. There is no such power where the evil cannot be foreseen. A man need not, it is true, do this or that act, – the term *act* implies a choice, – but he must act somehow. Furthermore, the public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor. The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members. There might be a pension for paralytics, and state aid for those who suffered in person or estate from tempest or wild beasts. As between individuals it might adopt the mutual insurance principle *pro tanto,* and divide damages when both were in fault, as in the *rusticum judicium* of the admiralty, or it might throw all loss upon the actor irrespective of fault. The state does none of these things, however, and the prevailing view is that its cumbrous and expensive machinery ought not to be set in motion unless some clear benefit is to be derived from disturbing the status quo. State interference is an evil, where it cannot be shown to be a good. Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise. The undertaking to redistribute losses simply on the ground that they resulted from the defendant's act would not only be open to these objec-

28 Basic Questions I, nos 1/1–8.

tions, but, as it is hoped the preceding discussion has shown, to the still graver one of offending the sense of justice. Unless my act is of a nature to threaten others, unless under the circumstances a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbour against the consequences, than to make me do the same thing if I had fallen upon him in a fit, or to compel me to insure him against lightning.«[29]

6/17 Basic Questions I identifies a reason for shifting losses and that is the goal of »prevention of damage«[30]. That justification for tort law is controversial in the U.S. among torts theorists. Some eschew any instrumental goal for tort law, insisting that it is and should be a mechanism for correcting harms visited on a victim by a wrongdoer. Prominent among this non-instrumental school are *Jules Coleman* and *Ernie Weinrib,* although a number of others are adherents[31]. The idea of prevention, in the form of efficient deterrence, has gained considerable attention with the advent of those employing an economic approach to law such as *Guido Calabresi* and *Richard Posner* who began with an analysis of tort law[32]. The leading proponent of a »mixed vision« of tort law that eschews the idea of a single meta-theory to describe or justify tort law is *Gary Schwartz*[33].

6/18 We would note one other reason for shifting losses that had considerable sway in the U.S. during the rise of strict products liability. Many scholars and jurists recognized the importance of »loss spreading«. The idea is that while shifting a loss does not make it disappear, as observed in Basic Questions I[34], shifting a catastrophic loss so that many share in it can actually reduce the magnitude of the loss – at least in terms of utility – on the insurance principle and may further diminish the loss by providing the means for rehabilitation to the injured victim[35].

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29 *Holmes,* Common Law 94–96.

30 »[I]t is important not to lose sight of the *primary* aim of the legal system, i.e. *prevention of damage.«* Basic Questions I, no 1/7.

31 *J.L. Coleman,* Risks and Wrongs (1992); *E.J. Weinrib,* The Idea of Private Law (1995) 187. More recently, *John Goldberg* and *Ben Zipursky* have crafted a non-instrumental civil recourse theory that has gained adherents (and critics). See *J.C.P. Goldberg/B. Zipursky,* Civil Recourse Revisited, 39 Florida State University Law Review (2011) 341.

32 See *G. Calabresi,* The Costs of Accidents (1970); *W.M. Landes/R.A. Posner,* The Economic Structure of Tort Law (1987); *R.A. Posner,* A Theory of Negligence, 1 Journal of Legal Studies (J. Legal Stud.) (1972) 29.

33 See *G.T. Schwartz,* Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice, 75 Texas Law Review (Tex. L. Rev.) (1997) 1801; see also *C.J. Robinette,* Can There Be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine, 43 Brandeis Law Journal (2005) 369.

34 Basic Questions I, no 1/2.

35 See *Calabresi,* Accidents 39–45; *Escola v. Coca Cola Bottling Co. of Fresno,* 150 Pacific Reporter, Second Series (P.2d) 436, 461, 462 (California 1944) *(Traynor, J.,* concurring).

II. An insurance-based solution instead of liability law?

6/19 The U.S. has adopted pockets of no-fault compensation. Occupational injuries, like Germany and Austria, are addressed through a compensation system that does not take into account employer or employee fault[36]. Legislation enacted in the wake of September 11 provided for compensation for victims of the attack on the World Trade Center and their families. A few states have enacted motor vehicle no-fault statutes that often do not completely displace tort law[37].

6/20 A word on one of the disadvantages of a no-fault system for dealing with accidental injury addressed in Basic Questions I. If fault is not taken into account, the incentive to take care for one's own safety is diminished, which would »promote carelessness in one's own affairs«[38]. That is also the standard account for retaining a rule of contributory negligence in the economic analysis of tort law[39]. However, at the end of the day, this is an empirical matter not a logical one. Moreover, there is good reason to think that non-legal incentives, including in the case of individual behavior creating a risk of personal injury to oneself, largely dwarf any incentives provided by tort law for appropriate self-regarding risky behavior[40].

III. Strict limits and rigid norms or fluid transitions and elastic rules?

6/21 The discussion of delimiting different claims and *F. Bydlinski's* theory of a flexible system for law is difficult for a common-law lawyer to parse[41]. To be sure, the common law has much overlap between putatively distinct areas of law. All classifications of legal principles are somewhat artificial and useful only to the extent that they contribute to coherency and fairness in application of the law.

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36 See *O. Kramer/R. Briffault,* Workers' Compensation: Strengthening the Social Compact (1991); *M.D. Green/D. Murdock,* Employers' Liability and Workers' Compensation in the United States, in: K. Oliphant (ed), Employers' Liability and Workers' Compensation (2012) 437 ff.

37 See *Franklin/Rabin/Green,* Tort Law and Alternatives[9] 852–857.

38 Basic Questions I, no 1/11.

39 See *Landes/Posner,* Economic Structure 75 f; *J.P. Brown,* Toward an Economic Theory of Liability, 2 J. Legal Stud. (1973) 323, 323 f; *R.A. Epstein,* Products Liability as an Insurance Market, 14 J. Legal Stud. (1985) 645, 653 f; *D. Haddock/C. Curran,* An Economic Theory of Comparative Negligence, 14 J. Legal Stud. (1985) 49, 52–54.

40 See *G.T. Schwartz,* Contributory and Comparative Negligence: A Reappraisal, 87 Yale L.J. (1978) 697, 713–19. *Schwartz* concludes his analysis of the role of contributory negligence in affecting victim behavior by observing that there is good reason to conclude that this effect is »partial and erratic«. *Idem* at 718.

41 Basic Questions I, nos 1/28–31.

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American tort law once was captured by the all-or-nothing thinking described in Basic Questions I[42]. Consequently contributory negligence barred all recovery; a victim either recovered or he didn't. Contribution between jointly and severally liable tortfeasors was not permitted, and the »last wrongdoer« was the proximate cause of harm and should bear all liability[43]. That all-or-nothing approach dissipated, resulting in major changes to U.S. tort law, throughout the 20th century[44].

42 Basic Questions I, nos 1/25–27.

43 See *L.H. Eldredge,* Culpable Intervention as Superseding Cause, 86 University of Pennsylvania Law Review (U. Pa. L. Rev.) (1937) 121, 124 f (describing evolution of last wrongdoer rule as an aspect of causation and its dissipation in the early part of the 20th century).

44 Judge *Calabresi* characterized apportionment of liability as the most important development in tort law since the advent of liability insurance, which occurred at the beginning of the 20th century. *G. Calabresi/J.O. Cooper,* New Directions in Tort Law, 30 Valparaiso University Law Review (Val. U. L. Rev.) (1996) 859, 868. Likewise, *R. Rabin,* another leading U.S. torts scholar, identifies the abandonment of all-or-nothing principles in tort law as one of the five most significant developments in tort law during the 20th century. See *R.L. Rabin,* Past as Prelude: The Legacy of Five Landmarks of Twentieth-Century Injury Law for the Future of Torts, in: M.S. Madden (ed), Exploring Tort Law (2005) 52.

Part 2 The law of damages within the system for the protection of rights and legal interests

6/23 Despite the occasional availability of injunctive or declaratory relief, damages measured by the defendant's unjust enrichment, nominal damages, or punitive damages, compensatory damages is still the standard remedy in tort cases. The function of compensatory damages is primarily, in American courts' opinions, to make the victim of the tort whole – that is, to compensate the victim – although deterrence is also sometimes discussed.

6/24 Compensatory damages in tort cases come in three forms – »general«, »special«, and »incidental« damages. General damages – the damages traditionally seen to be at the heart of the plaintiff's claim – are non-pecuniary damages, which consist of pain and suffering, loss of consortium, emotional distress, loss of enjoyment of life, or dignitary harm. Special damages are pecuniary damages – typically lost wages, medical expenses, or damage to property. Finally, incidental damages are costs incurred in mitigation – for example, in a auto accident case, the cost incurred by the plaintiff to rent a vehicle while the one damaged by the tortfeasor is being repaired. Each of these types of damages is recoverable by a tort plaintiff that has suffered physical or property damage. As explained in other chapters, however, a plaintiff may not usually recover where the sole injury she has suffered is emotional or economic. Although these rules are often couched in terms of »duty«, they are essentially limitations on the types of damages for which a plaintiff is permitted to recover.

6/25 Perhaps the most salient difference between the American remedial system and that of Europe is that in America damages are assessed by a jury, with little guidance provided by the judge. Despite common fears regarding the »Wild West« of jury damage awards, studies of tort jury verdicts have not borne out those fears. For example, in 2005, the nationwide median award for tort plaintiffs winning at trial in state courts was $ 24,000. This was only slightly higher than the average award in bench trials of $ 21,000. Moreover, tort recoveries generally have declined by 50 % since 1992. This trend is driven primarily by sharply declining verdicts in auto cases. By contrast, the median awards for products liability claims and medical malpractice cases actually rose during the same period.

6/26 Jury instructions regarding damages in torts cases are typically sparse, lending little specific guidance. By contrast, legislatures have, throughout the past 30 years, exerted increasing control over juries, capping damage awards as part of the tort reform movement, discussed above (see no 6/2 ff). Caps are often limited to general (ie, non-pecuniary) damages and often to particular types of claims,

most notably medical malpractice. It is unclear whether the purpose of such devices is to reign in damages awards seen to be disproportionate to the underlying wrong or injury, or simply to limit the raw number of tort claims.

I. Claims for damages

Basic Questions I states that deterrence is predominantly a function of criminal law and, especially in areas where tort compensation would not provide adequate deterrence, criminal law fills in those gaps[45]. We are not familiar with European criminal enforcement[46], but we are skeptical about the capacity of criminal law in the United States to provide adequate deterrence for the sorts of corporate misconduct that produce mass torts, such as asbestos, Vioxx[47], and DES[48]. **6/27**

First, criminal prosecutions of corporations in the United States are exceedingly rare[49]. The number of corporations successfully prosecuted for crimes at the federal level has consistently fallen over the last decade. In 1999, there were 255 such convictions[50]. In the 2011 fiscal year, only 160 business organizations were successfully prosecuted[51]. And, of course, those prosecutions cover the full **6/28**

45 Basic Questions I, no 2/51.

46 Although we note that Basic Questions I adverts, if fleetingly, to gaps in criminal enforcement (see no 2/62).

47 Vioxx was a prescription non-steroidal anti-inflammatory drug (NSAID) designed to treat acute pain and arthritis. It was withdrawn from the market when it was found to cause adverse cardiovascular events. See *McDarby v. Merck & Co., Inc.,* 949 Atlantic Reporter (A.) 2d 223 (New Jersey App. 2008).

48 »DES« is the abbreviation for diethylstilbesterol, a drug that was produced by many manufacturers to prevent miscarriages and which caused harm to those who were exposed in utero. It was the basis for the seminal decision adopting market share liability in *Sindell v. Abbott Laboratories,* 607 P.2d 924 (California 1980).

49 *V.S. Khanna,* Corporate Crime Legislation: A Political Economy Analysis, University of Michigan John M. Olin Center for Law & Economics, Discussion Paper No. 03-012, 12 (2003), available at <http://www.law.umich.edu/centersandprograms/lawandeconomics/abstracts/2003/Documents/khanna%2003-12.pdf>.

50 U.S. Sentencing Comm'n, Overview of Federal Criminal Cases Fiscal Year 2010 (2010) at 10, available at <http://www.ussc.gov/Research/Research_Publications/2012/FY10_Overview_Federal_Criminal_Cases.pdf>.

51 U.S. Sentencing Comm'n, 2011 Sourcebook of Federal Sentencing Statistics, tbl. 51 (2011), available at <http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table51.pdf>. The two areas relating to tort law in which there has been more prosecutorial activity is in the environmental and workplace areas. Yet, the environmental criminal prosecutions are focused on harm to the environment rather than personal injury. Thus, Rockwell International pled guilty in connection with its waste dumping at the Rocky Flat nuclear facility and paid fines of $ 18.5 million. The criminal prosecution was concluded before a jury awarded (later reversed on appeal) almost $ 177 million in compensatory damages and $ 111 million in punitive damages against Rockwell. See *Cook v. Rockwell Intern. Corp.,* 618 F.3d 1127 (10th Cir. 2010).

panoply of corporate misconduct that exists, including financial fraud, antitrust, and environmental crime.

6/29 From another perspective, the major mass torts in the United States over the past 30 years have produced very little in the way of criminal prosecutions. Consider asbestos, in which there were many punitive damage awards in the earlier years of the litigation based on egregious industry misconduct[52]. There has not been a single criminal conviction of an asbestos company in the United States. Indeed, so far as we can tell, there has been only one criminal case brought in the United States, and the defendants were acquitted[53]. The first criminal conviction worldwide occurred in Turin, Italy in 2012[54].

6/30 The Dalkon Shield mass tort involved an IUD (intrauterine device) that was constructed in a way that it wicked bacteria into the uterus of users, leading to sepsis, miscarriage, and death. The manufacturer became aware of these problems and proceeded to conceal and deny the problems until enough information leaked out that it was forced to withdraw the device from the market. The tort claims forced the company into bankruptcy. There was never any criminal prosecution arising from this mass tort[55].

6/31 In another mass tort that produced punitive damage awards generated by outrage over misrepresentations and a concerted and sophisticated scheme to conceal dangers, the tobacco industry has never been the subject of a criminal prosecution[56].

6/32 There have been some criminal prosecutions in high profile tort cases but they do not provide comfort about the criminal law providing adequate deterrence for large-scale corporate misconduct. In the 1960s, the Wm. S. Merrell Co. and three of its executives pleaded *nolo contendere* to providing false information to the government about one of the early anti-cholesterol drugs that caused cataracts in users and produced the first mass tort in U.S. history[57]. And there was a prominent, but unsuccessful, prosecution of Ford for its Pinto automobile that was condemned for trading lives for tort liability in its design[58].

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52 *P. Broduer,* Outrageous Misconduct: The Asbestos Industry on Trial (1985); *Fischer v. Johns-Manville Corp.,* 512 A.2d 466, 469 f (New Jersey 1986).

53 <http://scienceblogs.com/thepumphandle/2012/02/16/asbestos-company-owners-convic-1/>.

54 <http://switchboard.nrdc.org/blogs/jsass/first_ever_criminal_trial_of_a.html>.

55 *R. Sobol,* Bending the Law (1991) 67 FN 17. There was a grand jury investigation of officers of the manufacturer and the company, but it ended without a criminal indictment. Wall Street Journal (12 January 1990) at B2, 3.

56 By implication from the index to *R. Kluger,* Ashes to Ashes (1996), which lists crime but none of the entries, are about a criminal prosecution of a tobacco company.

57 See *M.D. Green,* Bendectin and Birth Defects: The Challenges of Mass Toxic Substances Litigation (1996) 83–86.

58 The popular understanding of Ford trading lives for its profits is incorrect. See *G.T. Schwartz,* The Myth of the Ford Pinto Case, 43 Rutgers Law Review (1991) 1013.

More recently, the pharmaceutical company Merck pled guilty to a misdemeanor and paid a $ 321 million fine in connection with its Vioxx drug that was pulled from the market after analysis showed that the drug, prescribed for arthritis pain, increased the risk of heart attacks. 6/33

However, the crime that Merck was charged with was only tangentially related to the heart disease its drug caused – Merck jumped the regulatory gun and began marketing the drug for arthritis before it was actually approved by the drug regulatory agency. Merck paid almost $ 5 billion to settle the civil cases, so the criminal fine was less than 10 % of its tort liability for its marketing of the drug for arthritis purposes before regulatory officials actually approved it for that purpose. 6/34

These exceptions against the backdrop of a substantial lack of criminal enforcement in some of the most culpable, large-scale, highly public mass torts in recent years makes an American observer dubious about the adequacy of criminal law to protect against egregious corporate misconduct that threatens harm of the sort that tort law protects. 6/35

II. Punitive damages

Basic Questions I[59] reflects the Continental European attitude toward punitive damages: to put it simply, tort damages are for compensation and punishment is for criminal law. Accepting for the moment that tort law should leave punishment to criminal law, there still is a case for punitive damages – putting aside their name – to facilitate deterrence of anti-social behavior[60]. Instead of »punitive damages«, we might describe them as »incentive-enhancing damages«[61]. When a repeat tortfeasor knows that the probability of a victim filing suit is less than 100 %, compensatory damages are inadequate to provide adequate deterrence. Victims may not claim for a variety of reasons: because they do not know who injured them, they are unaware of precautions that might have been taken to prevent the harm, they decide to forego suing because of the unpleasantness involved, too few lawyers practice tort law, some victims are risk averse about risking liability for the defendant's legal fees, or the damages are too small to support a lawsuit. In such a situation, compensatory damages will not deter the company from this course of action. Punitive damages, however, can be levied to provide incentives for the 6/36

59 Basic Questions I, nos 2/55–61.

60 We note the Principles of European Tort Law acknowledge, if grudgingly, the role of deterrence in tort law. See art 10:101 PETL (»Damages also serve the aim of preventing harm«). See *European Group on Tort Law,* Principles of European Tort Law.

61 Thus, the argument here parallels that of *G. Wagner* in: MünchKomm, BGB V[5] Vor § 823 no 2 f.

company to conform to the legal standard and create appropriate deterrence[62]. We note that, even in Europe, there has been increased interest in extra-compensatory damages when the standard measure of damages is inadequate to protect the interest involved[63].

6/37 Thus, we would observe about the famous case of Princess Caroline of Monaco. The defendant magazine, Bunte, published an interview with Princess Caroline that had never occurred. The article was a fraud. But the German federal Supreme Court held that the profits made by the defendant had to be considered in determining the appropriate amount of damages awarded so as to deter future infringements of her right to personality[64]. Indeed, *Volker Behr,* a German legal scholar, has remarked on the role of extra-compensatory damages in the German legal system:

6/38 »Although the growth of [exceptions to a pure compensatory award] has arisen out of varied factual situations, it is indicative of a systematic attempt to enforce the underlying principle that illegal conduct must not pay.«[65]

6/39 *Behr* cites several examples, including infringement of personality, to support his conclusion.

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62 *Dan Dobbs* advocates just such a legitimating role for punitive damages. See *D.B. Dobbs,* Ending Punishment in »Punitive« Damages: Deterrence-Measured Remedies, 40 Alabama Law Review (1988) 831. *Catherine Sharkey* has proposed recognizing punitive damages as reflecting societal damage that provides a windfall to plaintiffs. She draws on a few jurisdictions that have provided for »split-recover« schemes for punitive damages, which provide a portion of the award to the plaintiff to encourage pursuit of such claims and the remainder to the state to minimize the windfall. *C.M. Sharkey,* Punitive Damages as Societal Damages, Yale L.J. (2003) 113. One difficulty with split-recovery schemes is that they create substantial incentives to settle the case, as the portion that would go to the state if a judgment were entered including punitive damages can be captured by the parties when the case is settled and there is no basis for determining that punitive damages were awarded.

63 In 2009, the Institute for European Tort Law published a comparative assessment of punitive damages in common law and civil law systems, revealing at least some leaks in the no-punitive-damages dam in European countries: *H. Koziol/V. Wilcox* (eds), Punitive Damages: Common Law and Civil Law Perspectives (2009). In 2010, there was a conference at the Ius Commun Research School in the Netherlands on the Power of Punitive Damages. That workshop produced a volume by *L.Meurkens/E. Nordin* (eds), The Power of Punitive Damages (2012), with the provocative subtitle »Is Europe Missing Out?«.

64 See *T.U. Amelung,* Damage Awards for Infringement of Privacy – The German Approach, 14 Tulane European and Civil Law Forum (1999) 15, 21–24. We have been informed by *Helmut Koziol* that a number of German scholars suggested that rather than tort, the federal Supreme Court could have relied on unjust enrichment to justify the super-compensatory damages. See *P. Schlechtriem,* Bereicherung aus fremdem Persönlichkeitsrecht, Hefermehl-FS (1976) 445; *C.-W. Canaris,* Gewinnabschöpfung bei Verletzung des allgemeinen Persönlichkeitsrechts, Deutsch-FS (1999) 87 ff; *M. Schrewe,* Haftung für die unerlaubte Nutzung fremder Sachen und Rechte (1998) 28 ff, 188 ff, 357 ff.

65 *V. Behr,* Punitive Damages in American and German Law – Tendencies Towards Approximation of Apparently Irreconcilable Concepts, 78 Chicago-Kent Law Review (2003) 105, 147.

Before leaving the subject of punitive damages, we wish to endorse the assessment in Basic Questions I that punitive damages are a controversial matter in the United States[66]. There was a time when the growth in the award of punitive damages was troubling and the threat of punitive damages was deterring productive activity because corporate executives worried about these damages, over-estimated their frequency and magnitude, and were risk averse[67]. **6/40**

In 1982, *David Owen,* after cataloguing the rise of punitive damage awards in products liability cases, wrote: »Such awards[68] have become well accepted in principle, and my concern is now that large awards of this type are becoming almost common.«[69] Since that time, there has been a flurry of legal reforms that have limited the award of punitive damages in the United States. Some of those reforms are a result of the United States Supreme Court restricting punitive damages under the constitutional principle of due process[70] and others are the product of state legislatures that have passed a variety of reforms to limit punitive damages[71]. **6/41**

The results of those legal changes as well as attitudinal shifts are that punitive damages are infrequently awarded in the U.S. today, especially in personal injury tort litigation, the core of tort law. A recent study found that in 2005, punitive damages were only awarded in about 5 % of trials in which plaintiffs were successful[72]. Since plaintiffs are successful in only about half of tried cases, that is 2.5 % of cases tried to judgment. And given the infrequency of case resolution by trial, it represents around 0.04 % of tort cases filed[73]. **6/42**

Moreover, the incidence of punitive damages in personal injury torts is only 20 % of what it is for commercial torts. So, if we're interested in the frequency of punitive damages in personal injury tort cases, it is less than 1 % of cases tried to a verdict and around 0.01 % of cases filed. The median award in the 700 punitive **6/43**

66 Basic Questions I, no 2/58.

67 See eg *S. Garber,* Product Liability and the Economics of Pharmaceutical and Medical Devices (1993) 72–74 (explaining how the »availability heuristic« results in corporate decision making that overestimates the risk of a high-damage verdict).

68 *Owen* was referring to the infamous *Ford Pinto* case in which a teenager who was badly burned due to a defect in the fuel tank received a punitive damage award of € 329 million in 2012. See *Grimshaw v. Ford Motor Co.,* 174 California Reporter (Cal. Rptr.) 348 (App. 1981).

69 *D. Owen,* Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 University of Chicago Law Review (1982) 1, 6; see also *Moore v. Remington Arms Co.,* 427 North Eastern Reporter (N.E.) 2d 608, 616 f (Illinois Ct. App. 1981) (»The tide has … turned: judgments for punitive damages are now routinely entered across the nation, and staggering sums have been awarded.«).

70 See eg *State Farm Mutual Automobile Insurance Co. v. Campbell,* 538 U.S. 408 (2003).

71 For a comprehensive cataloguing of all punitive damage legislative reform, see <http://www.atra.org/issues/punitive-damages-reform> (last visited 15. 1. 2013).

72 *L. Langton/T.H. Cohen,* Bureau of Justice Statistics Special Report, Civil Bench and Jury Trials in State Courts, 2005 (2008) 6, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf>.

73 *M. Galanter,* The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 Journal of Empirical Legal Studies (2004) 459, 459.

damage awards in 2005 was € 50,000, although the average was about € 340,000 because of outlier high awards. Among the different class of tort cases, commercial tort claims – interference with contractual relations – had the highest median at € 5.4 million.

III. Preventive damages

6/44 It is true, as Basic Questions I argues[74], that tort law does not recognize an action purely for preventive damages. From that premise, Basic Questions I proceeds to reason, first that prevention (or deterrence) is not the sole aim of tort law, second that deterrence is secondary to compensation, which is the »primary task«[75] of tort law, and third that *G. Wagner's* argument in favor of preventive damages is not »very convincing«. An American tort observer would surely acknowledge that deterrence is not the sole aim of tort law. But surely compensation is not the sole aim of tort law, otherwise an injured person would be able to recover compensation from any deep pocket that the victim could find.

6/45 As Basic Questions I recognizes at the outset, the default for harm that occurs is that the victim bear his loss[76]. Something more than a need for compensation is required for tort law to activate its cumbrous machinery. So, we believe that neither compensation nor deterrence are the sole aim of tort law[77]. An American observer might add that the relative balance of compensation and deterrence in tort law is not static but dynamic. The role of deterrence was significantly enhanced in the latter part of the 20th century when courts began taking more seriously, prompted by scholars, the instrumental impact of tort law[78]. A Westlaw search of state negligence cases in which in discussing duty (the central element in which U.S. courts consider policy) the word »deterrence« appears produces hundreds of results[79]. »[T]he jurisprudence of modern products liability –

74 Basic Questions I, nos 2/63–67.

75 Basic Questions I, no 3/1.

76 Basic Questions I, nos 1/1–3 (»Hence, there must be *particular reasons* that appear to justify allowing the victim to pass the damage on to another person.«).

77 See *Schwartz,* 75 Tex. L. Rev. (1997) 1801.

78 See *G.L. Priest,* The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law, 14 J. Legal Stud. (1985) 461.

79 The following is a sample of the resulting cases, with parentheticals indicating that each court considers instrumental considerations in its duty analysis: *Grafitti-Valenzuela v. City of Phoenix,* 167 P.3d 711, 714 (Arizona 2007) (»Public policy may support the recognition of a duty of care.«); *Bartley v. Sweetser,* 890 South Western Reporter (S.W.) 2d 250, 254 (Arkansas 1994) (refusing to impose on a landlord a duty to protect tenants from crime due to policy reasons such as »the economic consequences of the imposition of the duty; and the conflict with public policy allocating the duty of protecting citizens from criminal acts to the government rather than the

whether based on negligence or strict liability – is replete with instrumentalist considerations.«[80]

Indeed, from the apex of the 1970s and 1980s when »loss spreading« was a popular idea that found widespread acceptance, U.S. tort law has grown and recognized that compensation through the tort system is both costly and much delayed[81]. Much more significant to current theory about tort law's goals is the morally-based idea of corrective justice. The unfairness of wrongly causing harm to another is the occasion for damages to be awarded and the lost shifted from the victim to the wrongdoer[82]. **6/46**

Thus, we do not view compensation as the primary goal of tort law and certainly not one that displaces deterrence when damages are inadequate to fulfill that role. As a consequence, we find the idea of preventive damages attractive[83]. **6/47**

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private sector«); *Shin v. Ahn,* 165 P.3d 581, 587 (California 2007) (holding that primary assumption of risk applies to golf, and therefore that the defendant did not owe a duty, in part because »[h]olding [golf] participants liable for missed hits would only encourage lawsuits and deter players from enjoying the sport«) (citation omitted); *Century Sur Co. v. Crosby Ins.,* 21 Cal. Rptr. 3d 115, 125 (California 2004) (imposing a duty on insurance brokers for misrepresentations in insurance applications, in part because to do so »would act as a deterrent in preventing future harm«); *Monk v. Temple George Assocs,* 869 A.2d 179, 187 (Connecticut 2005) (recognizing that analysis of duty necessarily includes public policy considerations such as: »(1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions«); *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.,* 906 A.2d 168, 218 (Delaware Chancery Court [Del. Ch.] 2006) (refusing to impose a duty on the part of the directors and advisors of a litigation trust in part because »the deterrent to healthy risk taking by businesses would undermine the wealth-creating potential of capitalist endeavors«); *NCP Litig. Trust v. KPMG L.L.P.,* 901 A.2d 871, 883 (New Jersey 2006) (holding that a claim for negligence may be brought on behalf of a corporation against the corporation's allegedly negligent third-party auditors, in part because »auditor liability would create an incentive for auditors to be ›more diligent and honest in the future‹«). Moreover, there are cases in which courts engage in explicitly instrumental reasoning in deciding matters related to whether there will be liability but do not refer explicitly to »duty«. See eg *Dalury v. S-K-I, Ltd.,* 670 A.2d 795 (New Hampshire 1995) (holding waiver of liability provision unenforceable because of the concern for keeping accidents at ski areas to a minimum).

80 *Cardi/Green,* 81 S. Cal. L. Rev. (2008) 671, 706 f.

81 *A.M. Polinsky/S. Shavell,* The Uneasy Case for Products Liability, 123 Harvard Law Review (Harv. L. Rev.) (2010) 1437; see *Schwartz,* 75 Tex. L. Rev. (1997) 1801, 1818 FN 128 (»Furthermore, the tort system's insistence on proof of elements such as negligence and defect assures that the tort system will deliver compensation only after substantial delays and considerable contention. These features seem inconsistent with any loss distribution rationale for tort law.«).

82 See no 6/17 above.

83 We also find the use of preventive damages less onerous than preventive injunctions, contrary to Basic Questions I, no 2/7. Injunctions directly command certain behavior and, because they are available before harm occurs, can be invoked more readily. By contrast, preventive damages are only awarded after an actor has engaged in conduct that has actually caused harm and, like injunctions are designed to avoid future incursions on protected rights. *M.F. Grady,* Counterpoint: Torts: The Best Defense Against Regulation, The Wall Street Journal, 3 September 1992, at A11.

At the same time, we acknowledge the operational difficulties in applying this concept to tort litigation.

IV. Criminal law

6/48 U.S. law, consistent with the observation in Basic Questions I, recognizes the overlap between criminal law and tort law[84]. Victim compensation programs are widespread, almost universal[85], throughout the U.S., spurred by incentives provided by the federal government[86]. Tort law regularly uses criminal statutes to provide more specific standards of care than the general »reasonableness« requirement[87]. With some frequency, the same conduct is the source of criminal prosecution and a tort suit, as occurred famously in the death of *Nicole Brown Simpson* in which her husband, *O.J. Simpson,* was accused of homicide[88].

V. The relationship between restitution and tort law

6/49 In the U.S., restitution, for which the remedy is the disgorgement of unjust enrichment, is an independent cause of action. It is therefore viable despite the concurrent availability of other actions, including torts. Thus, for example, if the defendant purloined the plaintiff's egg washer and used it to produce commercially marketed eggs, the plaintiff would be able to bring a tort suit, a restitution suit, or both[89].

6/50 To succeed in a restitution action, a plaintiff must prove that: (1) the defendant received a benefit; (2) at the expense of the plaintiff; and (3) it would be unjust for the defendant to retain that benefit[90]. The most notable distinction between

84 Basic Questions I, no 2/85.

85 See *W.G. Foote,* State Compensation for Victims of Crime 1992, Military Law Review (1992) 51, 53 FN 32 (»At the end of 1990, 44 states, the Virgin Islands, and the District of Columbia, were eligible to receive federal monies from the Crime Victims Fund. Five states – Mississippi, Georgia, Vermont, South Dakota, and New Hampshire – have new programs and will be eligible for federal crime victim funds in the near future. Maine is the only state without a crime victim compensation program.«).

86 See The Victims' Rights and Restitution Act of 1990, 42 U.S.C. § 10.606 f.

87 See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) §§ 14 and 16.

88 See *L. Deutsch,* Simpson to File for Retrial, Claims Legal Errors Made, South Florida Sun-Sentinel (26 March 1997).

89 *Olwell v. Nye & Nissen Co.,* 173 P.2d 652 (Washington 1946).

90 Eg *Walpole Woodworkers, Inc. v. Manning,* 57 A.3d 730, 735 (Connecticut 2012).

restitution's constituent elements and those of most tort actions is that a plaintiff need not prove wrongdoing on the part of the defendant. In other words, a defendant might be subject to a restitutionary remedy despite being a wholly innocent beneficiary. For example, where the defendant's husband, unbeknownst to the defendant, embezzled money from the plaintiff and used the money to buy a life insurance policy, plaintiff was entitled to recover unjust enrichment damages against the innocent defendant when the defendant collected on the policy[91]. The plaintiff would not have succeeded in a tort action against the defendant because the defendant committed no wrong (nor do the facts fit into any category of tort engendering strict liability).

6/51 A second distinction between restitution and tort law lies in the available remedy: the remedy for a tort is compensatory damages – damages sufficient to return the plaintiff to her pre-tort state. The remedy for restitution is unjust enrichment – disgorgement of any benefit gained by the defendant at the plaintiff's expense. For the owner of the above-mentioned egg washer, the remedy for the tort of trespass to chattels would be the machine's rental value, plus any damage to the egg washer inflicted during its unauthorized use. By contrast, unjust enrichment damages would likely be measured by the defendant's profits traceable to use of the egg washer. Of course, in some cases, unjust enrichment damages might look very similar to those assigned in tort[92]. For example, had the defendant used the egg washer for personal use, damages would likely be measured according to fair rental value pursuant to either a restitutionary or tort cause of action. Similarly, although fault plays no explicit role in restitution, a defendant's wrongdoing often plays a role in courts' choice among alternative means of measuring the defendant's unjust enrichment. For instance, in the case of the embezzled funds, described above, because the defendant was an innocent party the court chose not to award plaintiff the proceeds of the life insurance payout, limiting damages instead to the amount embezzled[93].

6/52 A third difference between restitution and most torts is the mechanism by which a damages award is enforced. A successful claim for damages in tort results in an order of attachment and execution, enforced by a court's order to the sheriff to seize and auction the defendant's property in satisfaction of the judgment. A restitutionary damages claim may be either »legal« – that is, enforced by attach-

91 *G&M Motor Co. v. Thompson,* 567 P.2d 80 (Oklahoma 1977).

92 The Restatement (Third) of Restitution and Unjust Enrichment lists the following as possible ways of measuring unjust enrichment: »(a) [T]he value of the benefit in advancing the purposes of the defendant, (b) the cost to the claimant of conferring the benefit, (c) the market value of the benefit, or (d) a price the defendant has expressed a willingness to pay, if the defendant's assent may be treated as valid on the question of price.« Restatement (Third) Restitution and Unjust Enrichment (2011) § 49.

93 *G&M Motor Co. v. Thompson,* 567 P.2d 85.

ment and execution – or »equitable« – resulting in an in personam order of the court, enforced by contempt. The advantages of equitable over legal restitution (or tort) are that: (1) equitable restitution allows the plaintiff to trace unjust enrichment through conversions in the property's form – eg, from stolen property to cash to appreciated new property purchased with the proceeds of the sale of the stolen property; and (2) an equitable restitutionary order typically gives the plaintiff priority in bankruptcy over unsecured creditors and later secured creditors.

6/53 Notwithstanding these differences, a plaintiff might, in the right case, succeed in both a restitution and tort claim and collect damages pursuant to both. Returning again to the stolen egg washer, the plaintiff might have recovered for damages to the machine itself in a trespass action and recover the defendant's egg-washing profits in an action for restitution. Of course, where damages would address overlapping injuries – for example, the fair rental value of the egg washer – the plaintiff would be barred from recovering under both theories by the general rule against double-recovery.

Part 3 The tasks of tort law

I. Deterrence of fault and strict liability

Basic Questions I observes that both strict liability and liability based on fault serve the function of deterrence[94]. U.S. scholars would agree but there is a nuanced difference in which they each contribute to deterrence. In theory at least, a potential injurer subject to strict liability will not take any greater care than one who is subject to liability based on fault. Here, we invoke the famous Judge *Learned Hand* calculus of risk, which specifies that an actor is negligent when the magnitude of harm risked by the actor's conduct discounted by the probability it will occur is greater than the cost of prevention[95]. Actors, on this account, should take all precautions that are cost justified in the sense that the precautions will be less costly than the accidents that would result if those precautions were not taken. **6/54**

Strict liability would not induce any greater care. A rational actor would not spend more on precautions than would be saved in avoiding liability costs. The only difference between fault and strict liability is with the distributional consequences: actors would bear the costs of accidents that are not worth avoiding in a strict liability regime while victims would bear those losses in a negligence regime. **6/55**

The way in which strict liability can contribute to safety is by affecting actors' behavior in at least three ways: 1) reducing the level of activity; 2) moving the activity to a safer location; and 3) investing in research and development to produce new safety technology. One might wonder why fault-based liability cannot serve these functions. The answer with regard to the first two is that negligence is rarely used and perhaps ill-suited to determine the appropriate level of an activity, say transporting freight by truck. The appropriate mix of trucking, shipping, or air transport is a complicated question that the legal system is not well situated to make such determination[96]. The answer to the third question is that, as a matter **6/56**

94 Basic Questions I, no 3/6.

95 The algebraic formulation of this, invoked by Judge *Learned Hand* in *United States v. Carroll Towing,* 159 F.2d 169 (2d. Cir. 1947), is P (probability) X L (magnitude of loss) > B (burden of precaution).

96 See *W.M. Landes/R.A. Posner,* The Positive Economic Theory of Tort Law, 15 Georgia Law Review (Ga. L. Rev.) (1981) 851, 875–878; *S. Shavell,* Strict Liability versus Negligence, 9 J. Legal Stud. (1980) 1. The claim that negligence is not employed to decide activity levels has stirred controversy. See *S.G. Gilles,* Rule-Based Negligence and the Regulation of Activity Levels, 21 J. Legal Stud. (1992) 319.

of evidence and proof, it is very difficult to reconstruct what the optimal or reasonable level of investment should have been at some point in the past.

6/57 Third-party liability insurance does, as Basic Questions I observes[97], diminish the deterrence function of tort law[98]. The law's acceptance of such contracts reflects the importance of the compensatory function of tort law[99]. Indeed, it was only after the development of liability insurance in the early part of the 20th century in the U.S. that enabled tort law to grow and become a more significant force in the civil law[100].

6/58 Yet, in the U.S. at least, there are many forces and developments that ameliorate the negative effect of liability insurance on deterrence. Many very large companies, because their size enables them to absorb the vicissitudes of chance, self insure against tort liability. Those that do not, typically have large deductibles, thereby insuring only against very large damage awards. Even with regard to large awards, liability insurance policies in the U.S. have limited coverage; often automobile liability insurance is sold with inadequate limits for the range of harms a driver may cause. And automobile insurance, as well as some other liability policies, are loss rated so that one's loss experience bears on the premiums that will be charged in the future[101].

II. The penalty function

6/59 Basic Questions I describes graduated awards based on the culpability of the defendant. The U.S. is quite schizophrenic about this matter. Damages doctrine does not distinguish degrees of fault for purposes of the appropriate measure of damages. Rather, damages are determined solely by the extent of loss of the victim. Punitive damages are an exception to this principle, and when a defendant's conduct exceeds the threshold of fault for awarding punitive damages, then an additional measure of dollars may be extracted from the defendant[102].

6/60 Despite the law's level standard for determining damages, it is the jury that determines the actual amount. With regard to non-pecuniary damages for which

97 Basic Questions I, no 2/70.

98 See *G.T. Schwartz,* The Ethics and the Economics of Tort Liability Insurance, 75 Cornell Law Review (Cornell L. Rev.) (1990) 313, 313 FN 4.

99 *Breeden v. Frankford Marine Plate Accident & Glass Ins. Co.,* 119 S.W. 576 (Montana 1909), in which the court split 5:2, is credited as having resolved the matter of the legality of liability insurance contracts. Ibidem at 314.

100 See *Calabresi/Cooper,* 30 Val. U. L. Rev. (1996) 859, 868.

101 See *Schwartz,* 75 Cornell L. Rev. (1990) 313, 316 f.

102 Juries are given virtually unlimited discretion to decide, regardless of the culpability of the defendant, to decline to award punitive damages.

there is no objective measure, juries have considerable discretion in the amount they award. It is common knowledge that plaintiffs' lawyers believe it is to their advantage to show defendants in the most culpable light possible, even when strict liability is the applicable standard. Those lawyers believe that damage awards are affected by culpability, and there is empirical evidence supporting that intuition[103]. Thus, while the law provides for equal amounts of damage, juries have considerable room to respond to their intuitions about the severity of a defendant's wrongdoing in awarding damages.

Basic Questions I critiques the extreme claims of law and economics that effi- **6/61**
ciency is or should be the sole goal of tort law (or law more generally)[104]. Very few in the law and economics field in the U.S. maintain that claim today. Instead, law and economics analysis tends to proceed along the lines that: »if we wish to take efficiency into account, this is how the law might be structured.«[105] Much law and economics analysis also includes an assessment of fairness concerns[106]. Indeed, *Guido Calabresi,* one of the early scholars who employed economic analysis to assess tort law, acknowledged that fairness was a constraint – a veto power – on any reforms designed to improve tort law's capacity to further economic efficiency[107].

Many others have joined Basic Questions I in criticizing economists for rigid **6/62**
models that do not conform to human behavior. We might add that the failure of economists to test empirically the claims that their analysis lead them to is another concern. Modeling that actually predicts or explains behavior may be valuable even if aspects of it do not take into account the complexity of human behavior. But that value must be demonstrated by connecting it to real world phenomena.

One major improvement in the work of economic analysis of law that has de- **6/63**
veloped over the past several decades is the development and use of behavioral economics. This discipline, marrying psychologists and economists, provides a

103 See *E. Greene,* On Juries and Damage Awards: The Process of Decisionmaking, 52 Law & Contemp. Probs. (1989) 225, 233 f.

104 Basic Questions I, no 3/16.

105 See eg *S. Garber,* Products Liability and the Economics of Pharmaceuticals and Medical Devices (1993) 2 (»Moreover it may not be desirable to focus reform efforts entirely on economic goals; other considerations – such as compensation – are also considered crucial by many.«).

106 See eg *A. Porat,* Misalignments in Tort Law, 121 Yale L.J. (2011) 82.

107 See *Calabresi,* Accidents 24–26 (identifying justice or fairness as one of the principal goals of tort law). Basic Questions I, fails to appreciate the scheme set forth by *Calabresi,* Accidents. Basic Questions critiques *Calabresi* because of the difficulty of actors determining ex ante whether they are the cheapest cost avoider, in light of the complexity and amorphousness of the determination (Basic Questions I, no 3/18). Yet, *Calabresi,* recognizing that difficulty, recommended that cheapest cost avoiders be determined on a categorical basis and that those categories be determined in advance of the behavior it addresses. Whatever the difficulties and flaws in *Calabresi's* scheme, it would provide far greater direction about when parties would be subject to liability rules than the current tort system with its ex post, case-by-case determinations. (There may be a difference to European law: duties of care are said to be determined in advance – at least to some extent that seems to be true.)

much richer account of how humans make decisions, the way in which those decisions deviate from the economically rational model, and the implications of those »biases and heuristics« for the legal system[108].

6/64 Basic Questions I observes, in its criticism of law and economics, the assumption that »everyone will observe the standard of care that is optimal in societal terms, since experience shows that very often it is the individual's own personal advantage that is accorded priority.«[109] Economists, however, would wholeheartedly agree with this observation. Then, they would respond by explaining that their efforts are to use liability so as to temper self-interestedness and encourage behavior that takes into account the interest of others when engaging in actions that can cause others harm. Indeed, the famous calculus of risk standard for negligence set out by *Learned Hand* in *Carroll Towing*[110] should have precisely that effect, requiring actors to take into account the interests of others or be held liable when the risks imposed on others are greater than the gains to the actor of doing so[111].

6/65 Basic Questions I raises concerns about strict utilitarianism, which might lead to sanctioning the taking of another's property or even life if the benefit to the taker was greater than the loss to the property owner or the person whose life was taken[112]. *Guido Calabresi* and *Douglas Melamed* addressed this matter, distinguishing between property rules – which invest owners with rights that the state will protect – and liability rules – which invest owners only of a right to compensation if harm occurs[113]. Property rights are protected from others who must bargain for and reach an agreement to purchase the right. Other rights, say the right to avoid loud parties on neighboring property, may only be protected by a liability rule. But tort law does not determine property rights, rather tort law takes what property rights exist, and protects those rights with liability rules. Taking another's property in the absence of an agreement by the owner to transfer her rights is not subject to the rules governing unintentional incursions on other property, but rather is governed by the rules of intentional torts for which there would be no utilitarian calculus applied to determine liability.

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108 See *F. Heukelom,* Kahneman and Tversky and the Origin of Behavioral Economics (Tinbergen Institute Discussion Paper No. 07-003/1, Jan 2007), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_Id.=956887>; *D. Laibson/R. Zeckhauser,* Amos Tversky and the Ascent of Behavioral Economics, 16 Journal of Risk and Uncertainty (1998) 7.

109 Basic Questions I, no 3/19.

110 *United States v. Carroll Towing Co.,* 159 F.2d 169 (2d Cir. 1947).

111 Not surprisingly, that is why the law and economics school has embraced Carroll Towing and its calculus of risk, indeed claiming that it was not new but reflected longstanding tort law. *Landes/Posner,* The Economic Structure of Tort Law 85–87. For a critique of this claim, see *M.D. Green,* Negligence = Economic Efficiency: Doubts, 75 Tex. L. Rev. (1997) 1605.

112 Basic Questions I, no 3/22 f.

113 See *G. Calabresi/A.D. Melamed,* Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. (1972) 1089.

Part 4 The area between tort and breach of an obligation

6/66 The view expressed in Basic Questions I[114] about the connection between and similarities of tort and breach of contract would bemuse an American reader. Tort law and contract law are treated as distinct subjects in U.S. law. An important area of contract law – the sale of goods – has been withdrawn from the common law field and is the subject of a uniform statute that has been enacted in 49 states[115]. In U.S. law schools, tort and contract are taught in separate courses and monographs address one or the other, not both. The »law of obligations« is foreign to the U.S. legal system. American lawyers would not contrast and compare the obligations imposed by tort and contract, as Basic Questions I does[116]. Rather, the U.S. legal system considers tort obligations to be ones imposed by law to address relations among strangers. By contrast, contractual obligations are matters of voluntary agreement that arise from that agreement.

6/67 The U.S. analog of the »third lane«[117] described in Basic Questions I is promissary estoppel, which is considered an adjunct to contract law rather than tort law. Promises can, however, be the basis for affirmative duties in tort law and therefore the basis of liability when conducted unreasonably[118].

6/68 U.S. law also confronts cases in which both tort law and contract law could apply. Products liability is one such important area, as is medical malpractice. Both of those areas, however, are limited to protecting bodily integrity and personal property interests. When economic interests are harmed because of contractual default, tort claims may also be asserted.

6/69 For historic reasons, in the U.S. professional malpractice is governed by tort law and is not a matter for contract law. On the other hand, in products liability, a victim may assert either tort claims or warranty claims and recover if either of those claims affords a right to relief[119]. In the area of economic interests, contract law is ordinarily given primacy, although fraud may vitiate that primacy. Even in the field of personal injuries, contract law is often given primacy. Thus contrac-

114 Basic Questions I, nos 4/2–8.
115 See *J.J. White/R.S. Summers,* Uniform Commercial Code[5] (2006).
116 Basic Questions I, no 4/4.
117 Basic Questions I, no 4/7.
118 See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) §§ 42 and 43.
119 Some jurisdictions refuse to permit duplicative claims be submitted to the jury, requiring an election by the claimant. But if the claims merely overlap rather than being entirely congruent, both may be considered by the jury.

tual disclaimers of liability for negligence are presumptively enforced, but may be overridden in cases in which the disclaiming party has little choice about agreeing to the waiver[120]. In the field of strict products liability, contractual disclaimers are per se invalid[121].

120 See eg *Tunkl v. Regents of the University of California,* 383 P.2d 441 (California 1963).
121 Restatement (Third) of Torts: Products Liability (1998) § 18.

Part 5 The basic criteria for a compensation claim

I. Damage

A. Recoverable damage and definitions

6/70 Much of the general description of damage, recoverable damage, and pecuniary and non-pecuniary damage in Basic Questions I comports with U.S. law, although »harm« is often the term employed to describe these detriments[122]. Tort law in the U.S. also permits recovery only for legally cognizable harm[123]. Thus, some U.S. courts have decided that »pleural plaque«, a scarring on the lungs due to asbestos inhalation that can be objectively determined by radiography but has no clinical symptoms – at least until it develops into asbestosis – is not a legally cognizable harm[124]. Quite evidently, U.S. law also supports Basic Questions I conclusion that »the relevant definition of damage is legally based.«[125]

B. Non-pecuniary damage

6/71 As with other legal systems, the U.S. is more restrictive in permitting recovery for non-pecuniary harm – more frequently referred to as emotional harm[126]. Emotional harm is a more accurate term, because limitations on recovery for this aspect of harm is with regard only to stand-alone emotional harm and does not apply when the non-pecuniary harm is consequential to bodily injury. When non-pecuniary loss is a result of bodily injury it may include physical pain as well as emotional harm, although the distinction between the two may be quite evanescent.

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122 The Third Restatement of Torts provides: »Physical harm« means the physical impairment of the human body (»bodily harm«) or of real property or tangible personal property (»property damage«). Bodily harm includes physical injury, illness, disease, impairment of bodily function, and death. Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 4. Emotional harm is defined as: »›Emotional harm‹ means impairment or injury to a person's emotional tranquility.« Ibidem § 45.

123 *D.B. Dobbs,* The Law of Torts (2000) § 114, at 269.

124 See eg *In re Hawaii Fed. Asbestos Cases,* 734 Federal Supplement (F. Supp.) 1563 (U.S. District Court for the District of Hawaii 1990) (pleural scarring does not entail physical harm that is compensable).

125 Basic Questions I, no 5/6.

126 The intentional tort of assault is a notable exception. This tort exists for the purpose of recognizing the emotional distress that occurs in the face of an imminent physical attack.

6/72 U.S. law restricts recovery for stand-alone emotional harm not only because of the difficulty of determining whether it exists[127] and the difficulty of valuing non-economic harm[128], as explained in Basic Questions I[129]. Other reasons thought to justify the more restrictive approach to compensating emotional harm include: 1) uncertainty in assessing the extent of the harm and the concomitant difficulty of valuing it; 2) the widespread nature of emotional harm, particularly in the face of public tragedies such as September 11, 2001 in the United States and the death of Princess Diana in France; and 3) the concern that giving legal recognition to emotional harm will increase the extent of it[130].

6/73 In recent years, some U.S. courts have recognized a subtly different non-pecuniary loss, variously identified as hedonic damage or loss of enjoyment of life (»LOEL«)[131]. This harm reflects the pleasures of life of which a victim is deprived because of bodily injury and is quite similar to the English concept of loss of amenities[132]. Unlike pain and suffering this type of damage can be recovered in some jurisdictions even by a victim who is comatose or in a wrongful death action[133]. While damages awarded to those class of victims are not »compensatory«, they do reflect real losses caused by the defendant's wrongdoing. Not surprisingly, law and economics scholars support recovery for LOEL, as well as supporting damages for more traditional pain and suffering on deterrence grounds[134].

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127 Very often, the existence of emotional harm is not seriously in doubt. Consider the reaction of passengers on the Boeing 787s that recently have had to do an emergency landing because of a variety of in-flight problems.

128 In the U.S., this is a particular problem because juries award non-pecuniary damages not only without any reference to a market value, but also without any information about awards in similar cases. This results in substantial variation from case to case, although the authority of judges to order new trials, remittitur, and, in some jurisdictions, additur moderates this variation. Scholars in the U.S. have developed numerous schemes to regularize the award of non-pecuniary damages. See *Franklin/Rabin/Green,* Tort Law and Alternatives[9] 724–726.

129 Basic Questions I, nos 5/10–12.

130 See *Dobbs,* The Law of Torts § 302, at 823 f; Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 45 scope note.

131 See eg *Fantozzi v. Sandusky Cement Prods Co.,* 597 N.E.2d 474 (Ohio 1992). See generally *E.A. O'Hara,* Hedonic Damages for Wrongful Death: Are Tortfeasors Getting Away with Murder? 78 Georgetown Law Journal (1990) 1687.

132 See *W.V.H. Rogers,* Winfield & Jolowicz on Torts[18] (2010) §§ 22-19 to 22-22, at 1027–1037 (2010).

133 Compare *Holston v. Sisters of The Third Order of St Francis,* 618 N.E.2d 334 (Ill. App. 1993) (allowing such an award) with *McDougald v. Garber,* 536 N.E.2d 372 (N.Y. 1989) (disallowing).

134 See eg *Jutzi-Johnson v. U.S.,* 263 F.3d 753, 758 (7th Cir. 2001) *(Posner, J.):* Awarding any amount of damages for pain and suffering has long been criticized as requiring the trier of fact to monetize a loss that is incommensurable with any monetary measure. We do not agree with the criticism. Pain and suffering are perceived as costs, in the sense of adversities that one would pay to be spared, by the people who experience them. Unless tortfeasors are made to bear these costs, the cost of being adjudged careless will fall and so there will be more accidents and therefore more pain and suffering.

On the other hand, recent behavioral research provides an additional ground for caution in compensating for emotional harm. That work reveals that those who suffer serious losses have a significant ability to adapt to the circumstances and often do so with less consequence to their happiness than might otherwise be expected. Some legal scholars recommend, consequently, that LOEL damages not be awarded[135] or that guidelines be developed and supplied to jurors addressing these claims[136]. 6/74

C. Non-pecuniary harm to legal entities

A corporation or other legal entity may not recover non-pecuniary damages because, at least in this sense, a corporation is not human[137]. 6/75

D. Distinguishing pecuniary and non-pecuniary damages

This difficulty, explained in Basic Questions I[138], has particular salience in the U.S., where legislative tort reform has frequently imposed »caps« on damage awards for non-pecuniary harms, while permitting full recovery of pecuniary damages[139]. This has resulted in plaintiffs attempting to shift what traditionally has been treated as non-pecuniary damages into the pecuniary category and defense counsel doing the opposite[140]. Thus, Professor *Joseph King* has proposed with regard to economic damages that »the victim should be compensated for past and future economic losses, and those economic losses should be broadly conceived to include sufficient money to help make the plaintiff whole and fulfilled in his current condition, or in other words a whole person today.«[141] 6/76

135 See *C. Sunstein,* Illusory Losses, 37 J. Legal Stud. (2008) 157.

136 See *S.R. Bagenstos/M. Schlanger,* Hedonic Damages, Hedonic Adaptation, and Disability, 60 Vand. L. Rev. (2007) 745.

137 See eg *A.T. & T. Corp. v. Columbia Gulf Transmission, Co.,* Civ. A. No. 07–1544, 2008 WL 4585439 (U.S. District Court for the Western District of Louisiana 2008) (»In Louisiana, it is manifest that a corporation cannot incur damages for inconvenience or mental anguish.«).

138 Basic Questions I, nos 5/23–31.

139 See <http://www.atra.org/issues/noneconomic-damages-reform> (last visited 19.1.2013).

140 This phenomenon is described by Professor *C. Sharkey,* Unintended Consequences of Medical Malpractice Damages Caps, 80 New York University Law Review (2005) 391, 429–443.

141 *J.H. King, Jr.,* Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law, 57 SMU Law Review (2004) 163, 205.

6/77 American courts do not recognize the concept of »frustrated expenses«, discussed in Basic Questions I[142]. Indeed, the rule that the plaintiff must prove that her injuries were in fact caused by the defendant's wrong is firm in American law[143].

E. Real and calculable damage

6/78 The terms »real« and »calculable« damage are not used by American courts. Courts do grapple with the analogous choice between damages measured by repair/replacement cost and diminution in market value. For example, suppose that a company leaked toxic chemicals into the ground, contaminating neighboring land. Should the measure of damages for trespass be the cost of restoring the land to its former state, the diminution in the land's market value, or the cost of restoration plus any residual diminution in value? Jurisdictions adopt a variety of hierarchies and subrules among these choices, sometimes depending upon the type of claim involved[144].

F. Positive damage and loss of profits

6/79 In America, the economic loss rule bars recovery for purely economic losses, with some exceptions[145]. Thus, as a stand-alone injury, lost profits are generally not recoverable. As an incident to a claim for physical or property damage, however, or in any of a variety of business torts – eg, tortious interference with contract, fraudulent audit, etc – lost profits are recoverable. As in Germany, American courts make no formal distinction between »lost profits« and »actual loss«. With regard to lost profits, however, the issue of certainty/speculation is often particularly relevant. The general rule is that although a jury is permitted to make inferences and estimations of damages based on the evidence, they may not speculate as to the existence of damages. In the context of lost profits, this means that the plaintiff must prove, more likely than not, that she indeed suffered lost profits, and the plaintiff must offer evidence from which a jury reasonably might infer and estimate an amount of loss.

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142 Basic Questions I, no 5/29 f.

143 This does not mean, of course, that a plaintiff may not offer proof of causation that is merely inferential. But where a defendant can affirmatively prove that an asserted loss or expense was not caused by the defendant's wrongdoing, the plaintiff may not recover that expense.

144 See eg *Terra-Products v. Kraft Gen. Foods, Inc.,* 653 N.E.2d 89 (Indiana Ct. App. 1995) (holding that in environmental contamination cases, restoration costs must be ordered, even where economically inefficient).

145 See generally *Aikens v. Debow,* 541 South Eastern Reporter (S.E.) 2d 576 (West Virginia 2000) (discussing the economic loss rule and its exceptions).

G. Damages in the case of unwanted birth

6/80 Three related claims fall under this general category. A »wrongful pregnancy« case is a suit filed by a parent arising from the birth of a child due to a physician's failure to perform properly a sterilization procedure. A »wrongful birth« case is one in which parents sue for the birth of an impaired child where the physician failed to diagnose the defect during pregnancy. Finally, a »wrongful life« claim is brought by a child who claims damage from having been born – typically arguing that had the doctor properly sterilized the parents or diagnosed the child's impairment, the parents would have been able to abort the pregnancy.

6/81 Courts are split on whether to allow wrongful life claims at all. Some have denied such claims by reasoning that to be alive in any state is better than not having lived at all[146]. Other courts have allowed recovery in such cases, but limited recovery to the special expenses associated with the disability[147]. Although most courts allow recovery in claims for wrongful pregnancy and wrongful birth[148], courts are sharply divided on the proper measure of damages. Several jurisdictions apply the »benefits rule« to such cases, allowing recovery but offsetting the costs of the child by the »worth of the child's companionship, comfort and aid to the parents«[149]. A few jurisdictions allow full recovery of all child-rearing expenses[150]. Most courts, however, allow recovery only for the costs associated with the pregnancy and birth and any extraordinary child-rearing expenses associated with the child's disability[151].

6/82 It is worth noting that although application of the benefits rule is deeply problematic when applied to wrongful pregnancy/birth/life cases, it is a broadly applicable (if uncommonly relevant) common-law rule of damages. This rule is captured in Restatement (Second) of Torts, § 920: »When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable«[152].

146 See eg *Berman v. Allan,* 404 A.2d 8 (New Jersey 1979).
147 See eg *Turpin v. Sortini,* 643 P.2d 954 (California 1982).
148 But see *Szekeres v. Robinson,* 715 P.2d 1076 (Nevada 1986) (denying recovery in a wrongful pregnancy case in which a healthy child was born).
149 *Johnson v. Univ. Hosp. of Cleveland,* 540 N.E.2d 1370, 1378 (Ohio 1989) (citing *Jones v. Malinowski,* 473 A.2d 429 [Maryland 1984]).
150 *Johnson v. Univ. Hosp. of Cleveland,* 540 N.E.2d 1370, 1380 (Ohio 1989).
151 Ibidem.
152 Restatement (Second) of Torts (1979) § 920 at 509.

II. Causation

A. The necessity of causation

6/83 Consistent with the universality of causation stated in Basic Questions I, U.S. law also requires a causal connection between the defendant's tortious conduct and the plaintiff's harm. Indeed, it is difficult to imagine a legal system in which tortious conduct and harm are not required to be tied together by factual causation[153]. Nevertheless several accommodations are made in the plaintiff's burden of proof when difficulties of proof and other policy grounds justify such.

B. The normativity of causation

6/84 The authors of this report have a slightly different view about the normativity of causation in law from that expressed in Basic Questions I[154]. We find normativity in determining the harms about which tort law inquires. Thus, in determining legally cognizable harm[155], tort law makes a normative choice about the harm for which compensation may be sought. When a court recognizes »lost chance« as a harm that tort law will recognize, it engages in a normative determination. Similarly in defining the conduct about which tort law inquires, a normative choice is made. That it is defendant's tortious conduct, rather than defendant's conduct, is a normative choice. However, once those two framing issues, frankly normative, are resolved, the remaining inquiry as to whether there is a but for or conditio sine qua non relationship between harm and conduct is not normative, but objective[156], because causation is not a phenomenon that can be directly perceived, it always has to be determined by inference from circumstantial evidence. That method of determination, however, says nothing about the objectiveness of causation.

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153 A comment about the terminology employed in this report. We use »cause« or »connection« to mean the physical consequences of some act in producing some harm. Like the PETL, art 3, the Third Restatement of Torts, and Basic Questions I, no 5/56, we distinguish cause from the matter of whether, all other tort elements for liability being in place, the defendant will, however, not be held liable. Once again, we use the terminology of the PETL and the Third Restatement and refer to this element as »scope of liability«. We note that the leading U.S. treatise similarly treats separately factual cause and scope of liability. See *Dobbs/Hayden/Bublick,* The Law of Torts[2] § 17 f.

154 Basic Questions I, no 5/54.

155 See no 6/70 above.

156 Indeed, we would go further and suggest that once the framing matter is resolved, causation in law is quite the same as causation in many other fields of inquiry, including scientific ones. See eg *K.J. Rothman,* Modern Epidemiology (1986) 11 (»We can define a cause of a disease as an event, condition, or characteristic that plays an essential role in producing an occurrence of the disease.«).

Similarly, law often relaxes the standard of proof imposed because of a paucity of probative evidence or even shifts the burden of proof. Conceding that these are normative responses to the availability of evidence also does not affect causation's objective nature.

6/85 We concur with Basic Questions I that the process of assessing the quantum of money that will be awarded to an injured victim is not an objective matter[157]. However, U.S. law would view as distinct the determination of the quantum of damages to be awarded for a given harm from the determination as to whether the given harm was factually caused by the defendant.

C. Conditio sine qua non

6/86 Almost all of what Basic Questions I expresses in this regard[158] would draw approving nods from a U.S. audience. We might want to add an explicit qualification for multiple sufficient causes (or overdetermined outcomes)[159], because in that circumstance it is *not* the case that the harm could have been avoided in the absence of the defendant's tortious conduct. But that is surely a quibble. We also appreciate the calm explanation in Basic Questions I to skeptics who complain about this definition of causation because of its inclusiveness. Other tort elements narrow the long list of factors that always are elements of the necessary causal chain leading to a victim's harm[160].

6/87 We should also explain a long and unfortunate dalliance with an alternative formulation for causation that has occurred in the U.S. The idea of a defendant's conduct constituting a »substantial factor« in producing the victim's harm was first aired by a U.S. scholar to address the matter of scope of liability[161]. And the first U.S. case to employ this term used it to deal with the problem of overdetermined outcomes, in which neither factor is a conditio sine qua non[162]. Adding to confusion over whether »subtantial factor« addresses factual cause or scope of liability was its adoption in the first Restatement of Torts in 1934 and that Restatement's collapsing causation and scope of liability into the single element of »legal cause«.[163] That adoption of substantial factor for causation resulted in many courts throughout the U.S. employing it, and jury instructions and appellate court

157 Basic Questions I, no 5/34.
158 Basic Questions I, nos 5/57–61.
159 See no 6/107 f below.
160 Basic Questions I, no 5/59.
161 See *J. Smith,* Legal Cause in Actions of Tort, 25 Harv. L. Rev. (1911) 103.
162 See *Anderson v. Minneapolis,* St. Paul & Sault Ste. Marie Ry. Co., 179 North Western Reporter (N.W.) 45 (Minnesota 1920).
163 See Restatement of Torts (1934) § 431.

opinions are replete with reference to this standard for factual causation, as well as for scope of liability.

6/88 The Third Restatement of Torts removes »substantial factor« from its treatment of causation and scope of liability, commenting on its lack of analytical quality to guide a factfinder in making causal determinations and its potential to mislead, commenting: »With the sole exception of multiple sufficient causes, ›substantial factor‹ provides nothing of use in determining whether factual cause exists. ... The essential requirement, recognized in both Torts Restatements, is that the party's tortious conduct be a necessary condition for the occurrence of the plaintiff's harm: the harm would not have occurred but for the conduct. To the extent that substantial factor is employed instead of the but-for test, it is undesirably vague. As such, it may lure the factfinder into thinking that a substantial factor means something less than a but-for cause or, conversely, may suggest that the factfinder distinguish among factual causes, determining that some are and some are not ›substantial factors‹. Thus, use of substantial factor may unfairly permit proof of causation on less than a showing that the tortious conduct was a but-for cause of harm or may unfairly require some proof greater than the existence of but-for causation.«[164]

D. Omissions

6/89 Once again, a U.S. reader would find the discussion of determining causation in the case of omissions contained in Basic Questions I[165] quite comfortable. In the case of omissions, it is the affirmative duty to act that provides the aspect necessary to frame the causal inquiry. Where omissions have been particularly troubling in U.S. jurisprudence is the situation in which multiple omissions are each sufficient to cause the harm[166].

164 See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 26 reporters note to cmt j. Commentators are in accord. See eg *D.A. Fischer,* Insufficient Causes, 94 Kentucky Law Journal (2005) 277, 277 (»Over the years, courts also used the substantial factor test to do an increasing variety of things it was never intended to do and for which it is not appropriate. [T]he test now creates unnecessary confusion in the law and has outlived its usefulness.«); *J. Stapleton,* Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences, 54 Vand. L. Rev. (2001) 941, 945, 978 (»The obfuscating terminology of legal cause, proximate cause and substantial factor should be replaced ...«).

165 Basic Questions I, nos 5/64–67.

166 See *D.A. Fischer,* Causation in Fact in Omission Cases, 1992 Utah Law Review 1335.

E. Modification of the causation requirement

6/90 As with Austrian and German law, U.S. law makes a variety of accommodations when evidence relating to causation is not reasonably available to the plaintiff. For a long time, those accommodations were justified on the ground that as between culpable defendants and an innocent plaintiff, the wrongdoers should bear the risk of a lack of evidence[167]. However, with the advent of comparative fault, plaintiffs may no longer be innocent, and this rationale for modifying the proof requirement for causation has lost persuasive force.

6/91 Also similar to Austrian and German law, highly culpable conduct may justify even greater lenity for finding causation. Concerted action as described in Basic Questions I[168] is recognized in U.S. law as a basis for holding all those engaged in the joint conduct liable for the harm produced by one of the joint actors[169]. On the factual, evaluative side, it is no doubt the case that juries are more likely to draw an inference of causation against a highly culpable defendant than if the defendant's misconduct was relatively minor[170].

6/92 The U.S. authors of this report recognize the description of alternative liability in Basic Questions I[171] and can state that the idea is widely accepted in the U.S.[172] They have some difficulty, however, with the analysis of the burden of proof in Basic Questions I. There, Basic Questions I states that in alternative causation »the causation by each relevant behavioural factor must be taken as proven when viewing both events in isolation due to the high concrete risk such behavior posed.«[173] In the U.S. proof that each of two tortfeasors created an equal risk of the harm that occurred to the plaintiff *would not* be sufficient to satisfy the plaintiff's burden of proof. The standard of proof in the U.S. is a preponderance of the evidence (or, equivalently, more likely than not), and merely showing an equal likelihood would fall short of meeting that standard of proof[174].

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167 See also Basic Questions I, no 5/80.

168 Basic Questions I, no 5/73.

169 See *F.V. Harper/F. James/O.S. Gray,* Harper, James and Gray on Torts[3] (2007) § 10.1, at 2 FN 4.

170 See *R.A. Nagareda,* Outrageous Fortune and the Criminalization of Mass Torts, 96 Michigan Law Review (1998) 1121, 1168–1170.

171 Basic Questions I, no 5/75.

172 See Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 28 reporters note to cmt f (2010). As to when one of the competing causes is innocent, as raised in Basic Questions I, no 5/86, U.S. law would not impose liability – all potential causes must be of tortious origin. See *Garcia v. Joseph Vince Co.,* 148 Cal. Rptr. 843 (App. 1978).

173 Basic Questions I, no 5/78.

174 We also share Basic Question's critique of the *Geistfeld* proposal (no 5/81). We note that *Geistfeld* reframes the causal question as to whether the *group's* tortious conduct caused the victim's harm. That reframing entails a normative move that requires justification in light of the principle, recognized in Basic Questions I, that liability is assessed with regard to individuals, not groups.

F. Proportional liability

6/93 Basic Questions I explains that whether joint and several liability or several liability is imposed in the alternative cause situation matters when one of the defendants is insolvent[175]. That is the primary effect of joint and several liability versus several liability: the risk of insolvency is laid on the defendants in the former and on the plaintiff in the latter. We would observe that one other effect of the choice between the two in the U.S. is, even when both tortfeasors are solvent, whether plaintiff or defendant(s) must sue the other tortfeasors. With several liability, plaintiff only recovers the (comparative fault) »share« of those joined as defendants[176]. By contrast, with joint and several liability, plaintiff can recover the full measure of damages from any one tortfeasor. This requires defendants to pursue other potentially liable parties for contribution or indemnity[177]. However, in the two hunters or mountain climber case, U.S. law would require that plaintiff join all those who might have been a cause of the plaintiff's harm in order to employ the alternative causation theory[178].

6/94 We note that the proportional (or partial) liability of the Principles of European Tort Law (PETL) is based on making a comparative assessment of each party's contribution to the risk of harm[179]. Thus, if two hunters negligently fire at the same time and only one bullet hits a third hunter and no other evidence indicates that one or the other was responsible, we would assess the risk contribution of each at 50 %[180]. We think that resolution of whether this »risk contribution« liability should be joint and several or several is not special to this case. One still might argue that the two defendants are wrongdoers and the plaintiff is not and therefore the risk of insolvency should be placed on defendants. Of course, if the

175 Basic Questions I, no 5/84.

176 This necessitates apportioning fault to non-party tortfeasors also responsible for plaintiff's harm. See Restatement (Third) of Torts: Apportionment of Liability (2000) § B18 and cmt c.

177 See Restatement (Third) of Torts: Apportionment of Liability (2000) § 10 cmts a and b.

178 See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 28(b) (»When the plaintiff sues *all* of multiple actors … the burden of proof, including both production and persuasion, on factual causation is shifted to the defendants.«) (emphasis added).

179 We note that there is a difference between assessing the proportion of liability based on ex ante risk contribution or based on ex post assessment of the probability of causation. See *I. Gilead/M. Green/B. Koch* (eds), Proportional Liability: Analytical and Comparative Perspectives (2013) 2 and FN 6.

180 For a taxonomy of the different contexts in which proportional liability might be employed and consideration of the pros and cons of broader use of proportional liability when evidence of causation does not permit finding that causation exists to the requisite standard of liability, see *Gilead/Green/Koch,* Proportional Liability.

plaintiff also tortiously contributes to the risk, then the case for joint and several liability is much weaker[181].

6/95 Risk contribution has received limited acceptance in the U.S., primarily, if not exclusively, in the context of asbestos litigation[182]. Because workers' compensation does not permit suit by injured employee against the employer, workers who suffer asbestotic disease must sue the manufacturers of the asbestos products to which they were exposed. Often, there are many such defendants and when the disease is not one that is progressive, such as cancer, determining which defendant's products was a cause of the plaintiff's harm is not possible based on current scientific understanding and methods. Rejecting the use of alternative causation, the California Supreme Court in *Rutherford v. Owens-Illinois, Inc*[183], crafted a risk contribution theory of liability. Rather than proving causation, plaintiff would be required only to prove that exposure to defendant's asbestos was »a substantial factor in contributing to the aggregate *dose* of asbestos the plaintiff … inhaled or ingested, and hence to the *risk* of developing asbestos-related cancer … «[184].

6/96 U.S. law would distinguish between the example of a patient falling ill due either to medical error or non-tortious forces and that involved in *Hotson v. East Berkshire Area Health Authority*[185], discussed in Basic Questions I[186]. The former involves alternative causation, albeit with one alternative cause arising in the victim's sphere. The latter involves an area known as lost chance or lost opportunity. In the U.S. unlike England, which declined to adopt a lost chance theory, courts have been more sympathetic to recognizing yet another adaptation to the requirement that plaintiff prove causation because the plaintiff cannot reasonably obtain the requisite evidence[187]. Thus, U.S. tort law treats differently lost chance, albeit limiting it to the medical error context and alternative causation when there the competing cause is innocent[188].

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181 With comparative responsibility in place, the case for either pure joint and several liability or pure several liability is not strong. See Restatement (Third) of Torts: Apportionment of Liability (2000) § 10 cmt a. A variety of hybrid systems is described and developed in ibidem §§ C18–E19.

182 The usage and advantages of this approach in the U.S. are canvassed in *M.D. Green,* Second Thoughts on Asbestos Apportionment, 37 Southwestern University Law Review (2008) 531.

183 941 P.2d 1203 (California 1997).

184 941 P.2d 1219.

185 [1987] Appeal Cases (A.C.) 750.

186 Basic Questions I, no 5/86.

187 See *Matsuyama v. Birnbaum,* 890 N.E.2d 819, 828 FN 23 (Massachusetts 2008) (citing 20 states plus the District of Columbia that have adopted some form of lost opportunity and 10 states that have rejected it). The most recent cases evidence a decided trend toward adopting lost opportunity as cognizable legal harm. See *Matsuyama v. Birnbaum,* 890 N.E.2d at 832.

188 Basic Questions I, no 5/87.

6/97 U.S. law does so for precisely the reason described in Basic Questions I[189], otherwise medical professionals would be free of liability whenever their errors were less probable than not (the civil standard of proof in the U.S.) the cause of the adverse outcome[190]. They have done so, predominantly, by recharacterizing the cognizable harm as the lost chance or opportunity of a better outcome[191]. Thus, a chance of a better outcome has value, and when a victim is deprived of it, he or she is entitled to compensation for that loss. However, U.S. courts have narrowly circumscribed this reform, limiting it to instances of medical negligence that deny a patient of a chance for a better outcome and where that lost chance is less than the required standard of proof[192]. Often unarticulated, but perhaps influential is the concern raised by *Hans Stoll* that Basic Questions I[193] explains: if medical errors disproportionately result in lost chances below the standard of proof threshold, then liability will be systemically less than it would be in an ideal world. This deficit is of more concern to the deterrence scholars[194]. We note another constraint on this theory – that reasonably good evidence of the magnitude of the lost chance must be available. U.S. courts reason that that condition is more often satisfied in the medical context, thereby providing another policy for limiting the application of lost chance.

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189 Basic Questions I, no 5/88 f.

190 For an explanation of where U.S. law accepts proportional liability and the substantial areas where it does not, see *M.D. Green,* United States Report on Proportional Liability, in: I. Gilead/M. Green/B. Koch (eds), Proportional Liability: Analytical and Comparative Perspectives (2013) 343 ff.

191 Inconsistently with the recognition of a lost chance as compensable in itself, most courts that have recognized lost chance as a compensable harm have limited recovery to instances when the adverse outcome actually occurs. See *Franklin/Rabin/Green,* Tort Law and Alternatives[9] 363.

192 If it were not so circumscribed, this theory could completely displace the requirement of proof of causation. See *V. Black,* Not a Chance: Comments on Waddams, The Valuation of Chances, 30 Canadian Business Law Journal (1998) 96, 98 (»all cases of causal uncertainty may potentially be converted into loss of chance cases by such a redescription of the harm«). The authors of this report have a difficult time understanding Basic Questions I, response to this concern (see no 5/90). The suggestion that lost chance is limited to »two particular events [that] pose an extremely high degree of concrete risk and thus were potentially causal« contains its own limitation on this doctrine. Moreover, the limitation does not accurately describe the lost chance theory, in which the medical error may have posed only a modest or even small increase in the risk of the adverse outcome. Yes, there are only two potential causes, but that is the serendipitous result of the context in which lost chance arises, in which the competing cause is one that is already proceeding. But even that potential cause may not be a high probability, as would occur in a lost chance case in which the probability of a successful outcome was reduced from 90 % to 80 % by the medical negligence.

193 Basic Questions I, no 5/88.

194 See *Doll v. Brown,* 75 F.3d 1200, 1206 (7th Cir. 1996) *(Posner J.)* (arguing for proportional liability in lost chance cases whether the probability is below or above the standard of proof to prevent »the opposite evils of overcompensation and overdeterrence«); *S. Levmore,* Probabilistic Recoveries, Restitution, and Recurring Wrongs, 19 J. Legal Stud. (1990) 691.

The international scholarly support for proportional liability described in Basic Questions I[195] is also the case in the U.S. Numerous scholars, with modest variation, have recommended proportional liability especially in the toxic tort arena when available scientific evidence does not permit a plaintiff to prove causation to the requisite standard of proof[196]. At the same time, courts have been notably resistant to accepting these recommendations. One of the authors of this report supports that resistance predominantly on the ground that the statistical scientific evidence brought to bear on toxic causation – being observational rather than experimental – is prone to small errors that are quite likely to produce outcomes that appear to support small increases in risk that could be the basis for proportional liability[197]. **6/98**

G. A comment on excursus

Basic Questions I, after canvassing the difficulties and inconsistencies in recognizing a limited lost-chance theory, concludes »it is astounding that manifold dogmatic difficulties, theoretical contortions and inconsistencies were merrily accepted in order to propagate an approach which offers only an insufficient, partial solution ... ; yet on the other hand, it is represented as untenable when the existing rules are thought through to their logical end.«[198] **6/99**

In this critique, Basic Questions I demonstrates a desire for a theoretically pure law of tort. To be pure, a single meta-theory would be applicable and all rules would reflect that theory. While there might be disagreement about how rules should be structured to further that theory, it would be a decisive criticism if a rule did not further the theory, conflicted with another rule, served other goals (at least without furthering the meta-theory), or failed to go as far as possible in service of the ends of the theory. **6/100**

By contrast, the authors believe that U.S. law is multi-faceted, and, given its common law source and the multiple jurisdictions playing a role in its development, it does not reflect any single meta-theory. Indeed, in addition to serving a variety of goals – goals without any algorithm as to how they should be weighted – often a tort rule will reflect serendipity or a well-turned phrase in a court's opinion **6/101**

195 Basic Questions I, no 5/92.

196 These scholars and their proposals are discussed by *Green* in: Gilead/Green/Koch, Proportional Liability 344 ff.

197 See *M.D. Green,* The Future of Proportional Liability, in: M.S. Madden (ed), Exploring Tort Law (2005) 352.

198 Basic Questions I, no 5/104.

that then is carried forward by the common law system[199]. Sometimes the development of law will be slow and halting toward achieving a given end; sometimes experiments in the law will occur, which upon experience and reflection are determined to have been a mistake[200] or require modification[201]. Sometimes the needs of society change and so does the law in adapting to and accommodating those societal changes[202].

6/102 In the case of recognizing lost chance for medical errors, the fact that health care professionals are engaged for the express purpose of enabling a patient to achieve a better outcome for their illness or disease may support a fairness rationale for limiting lost chance to health care professionals. Statistical evidence of the sort required for the functioning of a lost chance theory of recovery is important for administrative efficiency and coherence in litigation, providing additional reasons for limitations on those to whom it is applied. An intuition – there is no evidentiary basis for this of which we know – that medical errors of the sort involving lost chances tend to cluster below the applicable standard of proof, if true, would serve deterrence purposes. We concede that it is difficult to find a justification for limiting recovery for a lost chance to those instances in which the patient actually suffers the adverse outcome if the justification for lost chance is recognition of it as a compensable harm. Yet, this is one of many anomalies that occur in a common law system as judges accretionally attempt to work out a reform. Tort law in the U.S. is made from the bottom up, not from a top-down meta-theory guiding the development of the law.

H. Market-share liability

6/103 We would suggest that Basic Questions' I endorsement of market-share liability despite the difficulties it identifies in its application reflects just the sort of adaptation by the law to new demands to which we refer above[203].

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199 See *M.D. Green,* Apportionment, Victim Reliance, and Fraud: A Commentary, 48 Arizona Law Review (Ariz. L. Rev.) (2006) 1027, 1042–1044; *A. Calnan,* The Distorted Reality of Civil Recourse Theory, 60 Cleveland State Law Review (2012) 159.

200 As occurred with employing strict liability for design and warning defects after strict products liability was adopted. As the Third Restatement of Torts now reflects, courts turned away from that approach beginning in the 1980s and today there is very little strict in the liability for design and warning errors. See Restatement (Third) of Torts: Products Liability (1998) § 2; *D. Vetri,* Order out of Chaos: Products Liability Design-Defect Law, 43 University of Richmond Law Review (2009) 1373.

201 See below no 6/104 ff.

202 Some explain the development of negligence as the core basis of liability, rather than strict liability, in the latter part of the 19th century as driven by the importance of facilitating the development of fledgling industries at the beginning of the industrial revolution. See *M. Horwitz,* The Transformation of American Law 1780–1860 (1977) 67–108.

203 Basic Questions I, no 5/108.

6/104 We are not confident that market share liability would be applied to the mountain climbers case described in Basic Questions I[204] if the case arose in the U.S. As Basic Questions I explains[205], for market share to reflect the harm caused by each defendant, the risk of the relevant product or conduct must be the same. That is so with DES, which had a common formula, but we suspect that the risks created by the two mountain climbing defendants might well be different. The fact that we know that they each caused the same harm is a result of the small numbers of victims and actors and the fact that each actor's single act definitely caused harm. In DES, there were many women who were exposed but did not suffer the adverse effects. In the U.S., market share liability has been limited to products that pose generic risks. Thus, it has not been applied, for example, to asbestos product manufacturers because different asbestos products create different risks depending on how easily asbestos fibres can break free, the proportion of asbestos in the product, and, more controversially, the type of asbestos fibres used in the product[206]. If the conducts or products do not create equal risks, market share is not an accurate measure of the harm caused[207].

6/105 We should add that since the first decision adopting market share liability in 1980[208], approximately 15 U.S. courts have decided whether to adopt a market share theory. Those courts have split right down the middle on whether to accept market share or deny it[209]. Most of the courts that have declined to accept it have cited institutional authority – the legislature should be the entity making such bold change in tort law rather than courts. To our knowledge, no state legislature has enacted such legislation in the 30 years since market share liability has been on the U.S. torts landscape.

6/106 Basic Questions I also observes presciently on the practical difficulties and administrative costs of employing a market share approach[210]. We would add one more, resulting from the experience in the United States. Some market share decisions gave preference to using the most local market to determine market share, which might be the pharmacy from which the plaintiff's mother obtained her prescriptions or the municipality or region in which the mother lived at the time she obtained her DES prescriptions[211]. The desire to employ local markets was con-

204 Basic Questions I, no 5/105.
205 Basic Questions I, no 5/108.
206 *Franklin/Rabin/Green,* Tort Law and Alternatives[9] 382 f.
207 See *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.,* 379 F. Supp. 2d 348 (S.D.N.Y. 2005).
208 See *Sindell v. Abbott Labs,* 607 P.2d 924 (California 1980).
209 See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 28 reporters note to cmt p.
210 Basic Questions I, no 5/109 f.
211 See eg *Conley v. Boyle Drug Co.,* 570 Southern Reporter (So.) 2d 275, 284 (Florida 1990) (holding that the market »should be as narrowly defined as the evidence in a given case allows. Thus, where it can be determined that the DES ingested by the mother was purchased from a particu-

sistent with tort law's focus on individual justice – local market share would maximize the probability that manufacturers held liable *could* have caused plaintiff's harm. However, experience with the difficulties and costs of obtaining such proof led some later courts to adopt a national market share. Indeed, the high court in New York not only adopted a national market share but also held that a DES manufacturer could not exculpate itself by proving that it did not distribute DES in the location where plaintiff's mother obtained her DES prescriptions[212]. By denying exculpation, the New York court assured that some DES manufacturers would be liable to victims whose disease could not have been caused by those manufacturers. Adoption of such a scheme is a long step away from the tort system toward a compensation scheme.

I. Cumulative causation or multiple sufficient causes[213]

6/107 U.S. law on this issue is in accord with that described in Basic Questions I – each of B1 and B2 would be held a cause of death of K[214]. As explained elsewhere[215] most U.S. jurisdictions do not apply joint and several liability because of the advent of comparative responsibility. Thus, multiple tortfeasors whose conduct overdetermines the outcome would be held liable under whatever form of joint and several, hybrid, or several liability scheme the jurisdiction applied to other multiple tortfeasors who are each a cause of the plaintiff's harm.

6/108 In anticipation of the next section on superseding cause, we have an observation about one variation of the multiple sufficient cause circumstances. Specifically, we address multiple sufficient causes when one is the result of a tortfeasor and the other is innocent and therefore in the victim's sphere. While the source of the force does not change its causal status, whether liability for damage is imposed in this instance is a distinct question. The law of damages does not impose liability in the superseding cause situation when an innocent cause occurs that would produce the same damage. Thus, damages in the case of wrongful death end at the point where the deceased would have died from natural causes. Damages in such cases do not extend indefinitely. As the analysis of *F. Bydlinski* described in Basic Questions I reveals[216], superseding causation is equivalent to cumulative causation at the point where the superseding cause, sufficient to cause the harm, occurs. If damages law limits liability to the period before the innocent

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lar pharmacy, that pharmacy should be considered the relevant market«).

212 See *Hymowitz v. Eli Lilly & Co.,* 539 N.E.2d 1069 (N.Y. 1989).

213 The latter term is the one employed in the Third Restatement of Torts.

214 Basic Questions I, no 5/112.

215 See above no 6/2.

216 Basic Questions I, no 5/115.

cause occurs, there is a strong basis for treating similarly the tortfeasor whose conduct concurs with another sufficient, yet innocent, cause[217].

J. Superseding causation or duplicated harm[218]

This matter is not well treated in U.S. law. In the case of two tortfeasors, one whose conduct would have caused the same harm as the prior tortfeasor, but at some later time there is but one obscure case that we have been able to find addressing the matter[219]. However, both British and Canadian law impose full liability on the original tortfeasor[220]. By contrast, the circumstance in which an innocent force or one within the victim's sphere is a duplicating cause[221] is well settled in the United States, as explained above, on the basis of damages law, and the original tortfeasor's liability would end at the point where the second and innocent cause would have duplicated the harm. **6/109**

In the case of duplicated damages in which two tortfeasors are involved, the analysis by *F. Bydlinski* is attractive[222]. It is, however, as *Bydlinski* recognizes, in tension with another causal concept: preemption. Thus, if an outcome has already occurred, a subsequent event cannot be a cause of that already-occurred outcome[223]. **6/110**

Basic Questions I attributes non-liability in this instance to a lack of duty or perhaps a lack of breach of that duty[224]. U.S. law, on the other hand, holds a broader conception of the duty owed – at least with regard to causing personal injury or property damage. Thus, there is a default duty to act with reasonable care when one's conduct creates a risk to others[225]. Duty would not, in this regime, be as narrowly circumscribed with regard to specific property as explained in Basic Questions I. **6/111**

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217 See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 27 cmt d. This question has a long and controversial history. See *M.D. Green,* The Intersection of Factual Causation and Damages, 55 DePaul Law Review (2006) 671, 684–687.

218 »Duplicated harm« is a preferable term from a U.S. perspective because »superseding cause« is a term of art addressing whether to limit liability on scope of liability grounds.

219 See *Spose v. Ragu Foods, Inc.,* 537 New York Supplement (N.Y.S.) 2d 739 (N.Y. Sup. Ct. 1989).

220 See *Stene v. Evans,* [1958] 14 Dominion Law Reports (D.L.R.) 2d 73 (Alb. Sup. Ct. App. Div.); *Long v. Thiessen & Laliberte,* 65 Western Weekly Reports (W.W.R.) 577 (B.C. Ct. App. 1968); *Dingle v. Associated Newspapers Ltd.,* [1961] 2 Queen's Bench (Q.B.) 162 (dicta), aff'd, [1964] A.C. 371 (1962); *Baker v. Willoughby,* [1970] A.C. 467 (H.L. 1969); *H.L.A. Hart/T. Honoré,* Causation in the Law² (1985) 247 (»If both are wrongful the victim recovers the whole of his loss from the first wrongdoer.«).

221 Basic Questions I, no 5/114.

222 Basic Questions I, no 5/119.

223 See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 27 cmt h.

224 Basic Questions I, no 5/116.

225 See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 7. The Restatement notwithstanding, U.S. courts often employ narrow and constricted duties in order to decide a case as a matter of law and thereby prevent the jury from resolving the case.

6/112 Basic Questions I suggests a theory to justify imposing liability on the second tortfeasor[226]. The risk created by the second tortfeasor diminished the value of the property before the second tortfeasor destroyed it. Hence both are liable. A U.S. scholar suggested the same theory many years ago and a number of torts scholars have endorsed this »value« theory[227]. One difficulty with this theory is identified in Basic Questions I[228]. If the second tortfeasor did not create the risk before the harm occurred, this theory will not work. Thus, not only is it only a partial solution to this problem, it would treat differently identically-situated tortfeasors based on the serendipity of the chronology of their tortious conduct in relation to victim's harm. The second difficulty is that for this theory to be viable, the victim would have to be able to recover damages from the second tortfeasor for the lost value without either physical damage to the property or having realized the loss[229].

6/113 The authors of this report find the proposed solution to this conundrum of duplicated harms by multiple tortfeasors in Basic Questions I attractive and reasonable[230]. We would only suggest that a form of liability drawn from Chinese law, conditional liability, might best be appropriate. Thus, a conditionally-liable tortfeasor is liable if the primarily-liable tortfeasor is insolvent. We suggest this form of liability because we see no persuasive reason to multiply the number of lawsuits in order to provide recourse to the first tortfeasor who, but for the serendipity of another's later conduct, would be fully liable for the harm. We suggest that this recourse claim, if recognized will often generate separate litigation because the claim against the first tortfeasor will already have been resolved.

226 Basic Questions I, no 5/119.
227 See *R.J. Peaslee,* Multiple Causation and Damage, 47 Harv. L. Rev. (1934) 1127.
228 Basic Questions I, no 5/119.
229 See *D.B. Dobbs,* The Law of Remedies² (1993) § 3.3(3) at 234.
230 Basic Questions I, no 5/123.

Part 6 The elements of liability

I. Wrongfulness

A. Wrongfulness of conduct or of result

As with Austrian law, U.S. law only recognizes culpability (wrongfulness is not a term in wide usage[231]) with regard to conduct not outcomes. The German concept of wrongfulness described in Basic Questions I[232] would be completely unfamiliar to an American. Culpability or fault is assessed based on an objective standard[233]. The use of an objective standard reflects a trade-off that U.S. law accepts between a less complex inquiry with fewer administrative costs and the complications of proof required in assessing whether a party actually acted in a morally inappropriate manner. Throughout this U.S. response, we use fault or negligence interchangeably to reflect the objective standard of unreasonable conduct that is the core of the basis for liability for accidental injuries in the U.S. Where the objective standard is modified, as with children or the physically handicapped, we expressly distinguish it from a purely objective standard below. **6/114**

B. Threshold harm limitations

Threshold limitations are quite rare in U.S. law with regard to personal injury and property damage. Thus, unlike European countries that have taken advantage of the EU Directive permitting a threshold for strict products liability claims, no such limitation exists in U.S. law, not even for »bagatelles«. Perhaps because of the importance of bodily integrity, victims who suffer any such harm may pursue a remedy. As a practical matter, this lack of a threshold has not, with one exception we discuss below, caused any concern. The reason is that the costs of prosecuting a legal claim are so significant that no one would bring an action for trivial harm. Recall that the U.S. permits contingent attorneys' fees (which are in widespread use in tort claims) and does not shift attorneys' fees from the loser to the winner. **6/115**

231 The Dobbs treatise on torts, the leading contemporary text, has no entry for »wrongfulness« in its index. See *Dobbs/Hayden/Bublick,* The Law of Torts[2] Index 84.

232 Basic Questions I, no 6/4.

233 *Dobbs/Hayden/Bublick,* The Law of Torts[2] § 127, at 398. A few exceptions exist, such as for children or those with physical handicaps, and then a blended objective-subjective standard is employed: How would a reasonable 12-year-old with the skills of the defendant-child have acted under the circumstances?

As a result, many »negative value claims« are such that the costs of prosecuting them are greater than the expected value of recovery and, thus, are never brought. For example, in the medical malpractice area, the best plaintiffs' malpractice lawyers will not accept a case unless the damages are in the mid- to upper- six figure American dollars because of the expenses of prosecuting such cases.

6/116 With regard to some other interests, U.S. tort law does impose thresholds. Thus, the recent expansion of protection for emotional tranquility that permits certain negligence claims for pure emotional harm requires a showing that the victim suffered serious emotional harm[234]. This threshold is said to serve the dual purpose of eliminating claims for »routine, everyday distress that is a part of life in modern society« and in ensuring that those claims that are made are »genuine«[235], quite similar to the policies described in Basic Questions I[236]. Another area in which a threshold is imposed is in the nuisance arena. Thus, the interference with one's enjoyment of their real property must cause »significant harm«[237], because, again, modest incursions on one's enjoyment of his or her land is endemic in modern society and must be borne without compensation to enable life to go on and others to act with freedom in pursuing their goals. It may be that these thresholds are required, despite the practical impediments to suits explained above, because these claims are frequently asserted as additional claims added on to other claims with more substantial damages[238].

6/117 The one area involving personal injury in which what might be described as a »threshold« limitation has been adopted is in asbestos litigation where some courts have declined to recognize pleural plaque as a cognizable injury, as explained above[239]. In effect, this ruling creates a threshold, requiring that asbestotic disease progress to the point that it causes clinical symptoms. The reasons for imposing this limitation are quite compelling. Millions of Americans have been exposed to asbestos, and the claims of asbestos victims have bankrupted well over

234 See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2012) §§ 47 and 48. The Restatement relies, in part, on the same reasoning as in Basic Questions I: legal recognition of small or modest disturbances of emotional tranquility could result in exacerbating the magnitude of such harms.

235 See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2012) § 47 cmt l.

236 Basic Questions I, no 6/24 f.

237 See Restatement (Second) of Torts (1979) § 821F.

238 That phenomenon is certainly the case in the area of intentional infliction of emotional distress, where such claims are frequently added to employment-related and civil rights claims. Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2012) § 46 reporters note to cmt g (»Many cases exemplify the tendency to add a weak or unmeritorious claim for intentional infliction of emotional harm to a suit where the real gist of the claim is another tort or a statutory right.«).

239 See Basic Questions I, no 6/76.

75 companies in the U.S.[240] The vast majority of those claims have been by pleural plaque plaintiffs whose claims are »bundled« by plaintiffs' lawyers and settled on a global basis with asbestos-product manufacturers. The effect of those claims was to squeeze out recoveries by the victims who suffered the worst effects: mesothelioma is a cancer that is almost invariably fatal. *Peter Schuck* made a compelling case to defer resolution of pleural plaque claims so as to permit the worst-harmed plaintiffs to go to the front of the queue[241]. Denying compensable status to pleural plaque was one of the responses to this problem.

Basic Questions I observes that, aside from thresholds, the requirement of breach of duty imposes another limit on small claims. Basic Questions I reasons that there is not a duty to avoid extremely minimal impairments to other people[242]. This observation must be qualified with the recognition that the extent of the harm caused by one's conduct is a function not only of the risk-creating conduct but also chance. Thus, for example, if the driver of an automobile barely collides with a pedestrian, only contacting two of the pedestrian's fingers, in most such situations the harm will be minimal. But, if the pedestrian is a world-class pianist, the damages may be quite substantial. Conversely, acting in a way that creates substantial risk – target shooting in a crowded square – may result in only minor injuries or even no injury. Chance is frequently the difference between minimal and substantial harm; the culpability of the defendant is not determinative of the magnitude of harm. For that reason, U.S. law has no threshold of risk creation for the duty of reasonable care to be imposed. Basic Questions I does add that breach of duty may not occur with regard to the creation of small risks – when those risks are outweighed by the value of the risk-creating conduct, a proposition with which the authors concur[243]. **6/118**

C. The standard of care

With regard to U.S. law on the standard of care, we can best demonstrate the congruity between U.S. law and that described in Basic Questions I[244] by borrowing from the Third Restatement's explanation of this matter: **6/119**

240 See *S.J. Carroll/D. Hensler/J. Gross/E.M. Sloss/M. Schonlau/A. Abrahamse/J.S. Ashwood,* Asbestos Litigation (2005) 92–97.

241 See *P.H. Schuck,* The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 Harvard Journal of Law & Technology (1992) 541.

242 Basic Questions I, no 6/35.

243 Perhaps the language in Basic Questions I suggesting no duty is a result of the rather casual treatment of duty in civil law countries. In the U.S., duty is an explicit element of a claim for accidental injury and plays an important role injecting the court into deciding which claims should go forward for consideration by the jury and which claims should be denied. See *Cardi/Green,* 81 S. Cal. L. Rev. (2008) 671.

244 Basic Questions I, nos 6/39–44.

6/120 A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm[245].

6/121 The Restatement elaborates on this basic norm: the balancing approach rests on and expresses a simple idea. Conduct is negligent if its disadvantages outweigh its advantages, while conduct is not negligent if its advantages outweigh its disadvantages. The disadvantage in question is the magnitude of risk that the conduct occasions; as noted, the phrase »magnitude of the risk« includes both the foreseeable likelihood of harm and the foreseeable severity of harm that might ensue. The »advantages« of the conduct relate to the burden of risk prevention that is avoided when the actor declines to incorporate some precaution. The actor's conduct is hence negligent if the magnitude of the risk outweighs the burden of risk prevention. The burden of precautions can take a very wide variety of forms. In many cases it is a financial burden borne originally by the actor, although likely passed on, to a substantial extent, to the actor's customers. In highway cases, the burden can be the delays experienced by motorists in driving more slowly, and the greater level of exertion motorists must make in maintaining a constant lookout. In cases in which a gun owner is held liable for negligently storing a gun, thereby giving access to people who might use the gun improperly, the burden is the greater inconvenience the owner incurs in storing the gun in a more secure way[246].

D. Omissions

6/122 Before contrasting U.S. law with that explained in Basic Questions I[247], we wish to make a clarification that has often confused U.S. courts. An omission to act may, in fact, be subject to the ordinary duty of care if the entirety of the actor's conduct created a risk that threatens others. Thus, the case of a driver of an automobile who omits to apply her brakes at a red light would not be viewed as involving an omission[248]. The driver's conduct in operating her automobile created a risk to others and thereby required the exercise of reasonable care with regard to those risks and an omission to act could be the basis for breaching that obligation. Similarly, the building or acquiring of a dangerous building[249] would subject the actor

245 Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 3.
246 Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 3 cmt e.
247 Basic Questions I, no 6/45 f.
248 See *Satterfield v. Breeding Insulation Co.,* 266 S.W.3d 347 (Tennessee 2008); *Dobbs/Hayden/Bublick,* The Law of Torts[2] § 405, at 658 f.
249 Basic Questions I, no 6/46.

to the ordinary duty of reasonable care and would not be treated as one involving affirmative duties.

6/123 The United States, with its culture of rugged individualism, reveals less sympathy for imposing a duty to rescue (or ameliorate risks to others that are not created by the rescuer). The example cited by Basic Questions I[250] of a blind person walking unawares toward an open pit with the opportunity of easy rescue by an observer would not result in liability in the United States despite the egregiously immoral conduct by the observer. Although a number of North American scholars have decried this result and proposed schemes that would impose a duty of easy rescue[251], U.S. law has not accepted these entreaties. Freedom, potential for self-sacrifice if rescue duties are carried to extremes, difficulties of line drawing between easy and other rescues, problem of how to impose such a duty when there are multiple potential rescuers, and the implications for recognition of voluntary selfless rescues are claimed to justify U.S. law and are laid out by the libertarian-leaning scholar *Richard Epstein*[252].

6/124 And yet, there are chinks in the U.S. no-duty-to-rescue armor. A number of specific affirmative duties are well established, some arising from identified relationships and others from undertakings. Those relationships have tended to expand over time[253]. Americans have a long history of responding strongly when a prominent instance of rescue dereliction occurs. Indeed, on a few occasions, such episodes have produced legislation imposing a tailored duty to rescue in similar circumstances[254]. Indeed, the lack of impetus for greater reforms in this area may be because non-legal influences are sufficient so that non-rescue is an infrequent occurrence[255].

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250 Basic Questions I, no 6/47.

251 See eg *E.J. Weinrib,* The Case for a Duty to Rescue, 90 Yale L.J. (1980) 247.

252 See *R.A. Epstein,* A Theory of Strict Liability, 2 J. Legal Stud. (1973) 151, 197–204.

253 The Third Restatement of Torts recognized several new ones in 2012. Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2012) §§ 40(b)(5)–(6) and 41(b)(4).

254 Thus, in 1997, *Sherrice Iverson,* a seven-year-old was sexually assaulted and killed in a bathroom stall. The best friend of her attacker knew the attack was taking place and did nothing to stop it. A criminal statute was passed in both Nevada and California in the public outcry over the matter that required non-family witnesses to report sexual assault of children. See Sherrice Iverson Child Victim Protection Act, Cal. Penal Code § 152.3; Nev. Rev. Stat. Ann. § 202.882.

255 See *D. Hyman,* Rescue Without Law: An Empirical Perspective on the Duty to Rescue, 84 Tex. L. Rev. (2006) 653, 656 (reporting after empirical investigation that »proven cases of non-rescues are extraordinarily rare, and proven cases of rescues are exceedingly common – often in hazardous circumstances, where a duty to rescue would not apply in the first instance.«).

II. Fault

6/125 As in Germany and Switzerland[256], the standard of care in the U.S. is an objective one that does not take into account deficiencies of an individual. The standard justification, set out by *Oliver Wendell Holmes,* focuses not on the morality of imposing liability on someone who has not acted culpably but on the consequences to others and the administrative costs of determining each defendant's abilities:

6/126 The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason. In the first place, the impossibility of nicely measuring a man's powers and limitations is far clearer than that of ascertaining his knowledge of law, which has been thought to account for what is called the presumption that every man knows the law. But a more satisfactory explanation is that, when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account[257].

A. Children

6/127 The objective standard for determining fault is modified in a number of instances. As discussed in Basic Questions I[258], the standard of care is adjusted for children. Two different approaches exist in the U.S., one based on rule-like provisions and the other based on standards. The rule-based approach exempts children under the age of seven from liability for negligence, while for children between seven and 14 a rebuttable presumption exists that they are incapable of negligence. Children over 14 years in age are rebuttably presumed to be capable of negligence. The flexible approach, in place in a majority of states, employs a blended objective-subjective standard for children. Children must exercise the care that a reasonable child with the same intelligence, skills, and experience would exercise. Even

256 Basic Questions I, no 6/83.
257 *Holmes,* Common Law 108–110.
258 Basic Questions I, no 6/86.

this flexible approach invokes a rule with regard to children who are under a certain age, five-years-old in the form provided by the Third Restatement, who are deemed incapable of negligence[259].

An exception to the use of special rules for children exists when children are engaged in adult activities, such as driving a car or handling firearms. Children engaged in adult activities are subject to an unmodified reasonable care standard. **6/128**

B. The physically and mentally handicapped

Persons with significant and objectively verifiable physical disabilities are, like children, subject to a blended objective-subjective standard of care in the U.S. A blind person is not expected to exercise the same care as a sighted person, but instead must act as a reasonable person who is blind would act. In addition, the physically handicapped person must take into account that disability when determining in which activities to engage. A blind person who drove an automobile into a pedestrian would be negligent for attempting to operate the automobile, rather than for failing to avoid colliding with the pedestrian[260]. **6/129**

Basic Questions I describes voluntary action as a pre-requisite for fault-based liability[261]. U.S. law is similar: a person whose sudden incapacitation, including being rendered unconscious, without being reasonably foreseeable and due to a physical condition cannot be held negligent[262]. **6/130**

By contrast with those with physical disabilities, persons with mental or emotional disabilities remain subject to the unmodified reasonable care standard. This different treatment from the physically disabled is justified predominantly on grounds of administrative cost: determining the precise capabilities of a person with an emotional or mental difficulty, given the wide variation of such conditions, would be difficult and costly both to the parties and use of judicial resources. Even if such conditions could be assessed, ascertaining the causal connection between the disability and deficient conduct would also be problematical. Finally, many modest emotional harms do not affect the ability of the individual to exercise reasonable care. **6/131**

259 See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 10.

260 See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 11(a).

261 Basic Questions I, no 6/81.

262 The sudden incapacitation rule, however, does not apply when produced by an emotional or mental condition. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 11(b) and cmt d.

C. Superior abilities

6/132 Actors with superior abilities and knowledge must employ those traits. Once again, the standard is a blended one that takes into account the abilities of the defendant and inquires what care a reasonable person with such superior qualities would exercise. Thus, a race-car driver whose superior driving abilities would enable her to avoid an accident in an emergency situation that an ordinary motorist could not might be held negligent for failure to use her superior driving abilities in avoiding the accident[263].

6/133 We note that this standard is applied outside the realm of professionals and the standard applicable to them. With regard to professionals, they are expected to exercise their superior training and experience, but the way in which that requirement is imposed is different from non-professionals with superior abilities who engage in ordinary activities. Because juries are thought to be incapable in determining what constitutes reasonable care in a professional context because of its specialized nature, the standard of care for professionals is modified to require exercising the same care as is customarily exercised by other professionals in a similar context. The influential case of *Robbins v. Footer*[264], explains this standard and the requirement of proof through expert testimony:

6/134 As part of his prima facie case a malpractice plaintiff must affirmatively prove the relevant recognized standard of medical care exercised by other physicians and that the defendant departed from that standard when treating the plaintiff. In almost all cases the plaintiff must present expert witnesses since the technical complexity of the facts and issues usually prevents the jury itself from determining both the appropriate standard of care and whether the defendant's conduct conformed to that standard. In such cases there can be no finding of negligence without expert testimony to support it.

6/135 U.S. jurisprudence does not much concern itself with deficient professionals and justifying the imposition of an objective standard of care on them[265]. First, much professional malpractice is not the result of unqualified practitioners but the unfortunate fact that humans, regardless of their training and abilities, make mistakes. Second, professional licensing standards go a significant way toward ensuring that those who are unqualified do not provide professional services. Yet, inevitably some will be licensed who simply cannot consistently provide adequate professional care, such as an Iowa neurosurgeon who operated multiple times on the wrong side of his patient's brain[266]. To the extent that professional disciplinary

263 See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 12.
264 553 F.2d 123, 126-27 (D.C. Cir. 1977) (citations omitted).
265 Basic Questions I, no 6/89.
266 See *Locksley v. Anesthesiologists of Cedar Rapids, PC,* 333 N.W.2d 451 (Iowa 1983).

procedures are inadequate in dealing with such professionals, tort law's role is justified on deterrence grounds.

III. Vicarious liability

A. Introduction

We begin with some preliminary comments on terminology and justification. In the U.S. »auxiliary« is not a term in common usage. Rather, in U.S. law, »agents« are those hired by a principal to perform work on behalf of the principal. Agents are sub-categorized based on whether they are »employees« or »independent contractors.«[267] As best we understand, *Erfüllungsgehilfen* are equivalent to agents and *Besorgungsgehilfe* applies when there is no contractual privity between principal and victim[268]. Reference to a risk »within the principal's [or other relevant actor's] sphere« is also not a phrase employed in U.S. jurisprudence, although the concept expressed by the terminology is quite commonly used. **6/136**

Finally, a preliminary comment on the principle expressed in Basic Questions I that »vicarious liability may not be based on less substantial grounds than all other types of liability.«[269] The authors would frame the standard differently: vicarious liability should be imposed when the grounds for imposing it are weightier than the grounds for not imposing it. We do not understand the basic principles for liability to be the rock-bottom standard for when liability should be employed. Indeed, in the U.S., there is a history of extending liability (as well as contracting it) when contemporary social, cultural, economic, and technological forces justify it. Vicarious liability, while of long vintage[270], should be employed when it is preferable to not imposing liability on the principal. **6/137**

267 Independent contractors are non-employee persons hired to perform a task, often a specific task, for the hirer. Some independent contractors are agents and thereby authorized to act on behalf of the principal in specified respects and some are non-agent service providers. See Restatement (Third) of Agency (2006) § 1.01.

268 Since the seminal *MacPherson v. Buick Motor Co.,* 111 N.E. 1050 (N.Y. 1916), privity of contract has not played a role in tort cases.

269 Basic Questions I, no 6/96.

270 Vicarious liability became well established in England in the 18th century and was exported to the United States, which adopted the English common law system. See *W. P. Keeton/D.B. Dobbs/R.E. Keeton/D.G. Owen,* Prosser and Keeton on the Law of Torts[5] (1984) 500.

B. Liability of auxiliaries

6/138 As in Germany and Austria, auxiliaries retain personal liability even when the principal is vicariously liable for the auxiliary's tortious conduct[271]. Despite the legal rule, auxiliaries are rarely subject to indemnification claims[272]. The classic explanation for this phenomenon is that employees are largely insolvent, and suits against them would not be fruitful. *Gary Schwartz* explains several other reasons, including the employer's desire to obtain the employee's cooperation in defending against the tort claim, why indemnification claims are rarely made against employees by their employers[273].

6/139 Basic Questions I expresses concern with disproportionate and potentially ruinous liability being imposed on an employee if the employer is insolvent[274]. In the U.S. there is an important safety check on tort liability that ameliorates concerns about this possibility. Plaintiff's lawyers who are compensated based on a contingency fee are loathe to bring suit against an individual who is not covered by liability insurance[275]. As *Baker* puts it: »This practical immunity does not show up in tort law on the books.«[276] *Baker* also explains that liability insurance policy limits constitute de facto limits on the extent of liability[277]. While ordinarily an indemnification claim against an employee would be brought by the employer's liability insurer rather than an individual victim, if the employer is insolvent, then the claim contemplated in Basic Questions I against the employee would have to be brought by the victim.

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271 For reasons relating to apportionment of liability, U.S. law recognizes the difference between the vicarious liability of a principal and the liability of one subject to joint and several liability: whether a vicariously liable party is liable for the entire comparative share of harm assigned to the agent is often stated as whether a vicariously liable party is jointly and severally liable with the agent. This can be misleading and lacks precision, particularly when joint and several liability has been abrogated or modified. The vicariously liable party has not committed any breach of duty to the plaintiff but is held liable simply as a matter of legal imputation of responsibility for another's tortious acts. Restatement (Third) of Torts: Apportionment of Liability (2000) § 13 cmt c.

272 See *G.T. Schwartz,* The Hidden and Fundamental Issue of Employer Vicarious Liability, 69 S. Cal. L. Rev. (1996) 1739, 1753.

273 *Schwartz,* 69 S. Cal. L. Rev. (1996) 1739, 1764–1767. The other explanations *Schwartz* provides are maintaining good relations with the employee; the superior risk bearing capacity of the employer with regard to employee inadvertence that results in negligence; and the employer's sympathy and support for an employee who made an incorrect judgment in the course of attempting to further the employer's interests.

274 Basic Questions I, no 6/101.

275 *T. Baker,* Liability Insurance as Tort Regulation: Six Ways That Liability Insurance Shapes Tort Law in Action, 12 Connecticut Insurance Law Journal (Conn. Ins. L.J.) (2005) 1, 4–6.

276 *Baker,* 12 Conn. Ins. L.J. (2005) 6.

277 *Baker,* 12 Conn. Ins. L.J. (2005) 6.

Basic Questions I nevertheless endorses employee liability in the event of employer insolvency on the ground that as between the innocent victim and the wrongdoing employee, the risk of employer insolvency should fall on the latter[278]. That reasoning is persuasive, but no longer valid where comparative fault has replaced contributory negligence. With that reform, which occurred in the U.S. in the latter part of the 20th century, many doctrines that had developed and rested on the principle of innocent plaintiffs have been called into question and require re-examination[279]. **6/140**

In several other respects, including limiting vicarious liability to instances of employees acting within the scope of employment and the tension in imposing vicarious liability for intentional torts and more limited attribution rules, U.S. law is similar to the German/Austrian law described in Basic Questions I[280]. **6/141**

C. Respondeat superior

We wish to address two matters on this subject: 1) the scope of vicarious liability for an employer; and 2) the justifications for imposing liability on an employer in the absence of the employer's fault. **6/142**

The U.S. subscribes to the comprehensive version of respondeat superior described in Basic Questions I[281]. Employers are vicariously liable for harm tortiously caused by an employee within the scope of employment[282]. The liability of the employer is, thus, strict, but liability requires fault on the part of the employee. Additionally, an employer may be liable for its own tortious conduct – the most common form being negligence in selecting employees. **6/143**

The key to vicarious liability is the employer's *potential* control of the employee. Employers cannot actually control every act of an employee – consider an over-the-road truck driver. Indeed, vicarious liability in the U.S. applies even if the employer imposes rules that the employee ignores. An employer would be vicariously liable if its truck driver speeds, in violation of company rules, if the speeding results in an automobile accident[283]. **6/144**

The authors are in agreement that vicarious liability cannot be justified on the ground that the employer has increased the risk of harm by employing an em- **6/145**

278 Basic Questions I, no 6/100.
279 See *M.D. Green,* The Unanticipated Ripples of Comparative Negligence: Superseding Cause in Products Liability and Beyond, 53 South Carolina Law Review (2002) 1103.
280 Basic Questions I, nos 6/107–114.
281 Basic Questions I, no 6/117.
282 For details on the boundary issues involved in scope of employment, see Restatement (Third) of Agency (2006) § 7.07(2).
283 See *Warner Trucking, Inc. v. Carolina Casualty Ins. Co.,* 686 N.E.2d 102 (Indiana 1997).

ployee[284]. We would add to the response in Basic Questions I to this justification the observation that increasing risk is not a basis for imposing liability generally. An actor is only liable for increasing risk when doing so is unreasonable, that is, negligent. Thus, the increased risk rationale would require employer negligence in hiring the employee, which fails to provide a justification for liability of the employer without fault.

6/146 Yet we do think there are valid justifications for vicarious liability, which we can report is firmly established in U.S. law. *Gary Schwartz,* in a review of vicarious liability identifies three deterrence-based justifications for vicarious liability:

6/147 First, vicarious liability gives employers strong incentives to shrewdly select employees and effectively supervise employees; sound and shrewd employer practices should reduce the rate of employee negligence. Second, vicarious liability gives employers an incentive to discipline employees who have committed negligence and thereby exposed the employer to liability. This discipline can take the form either of a demotion or an outright discharge; effective disciplinary programs can both remove employees capable of causing future harm and give employees an ongoing incentive to abstain from negligence. Third, insofar as the prospect of employee negligence cannot be fully eliminated by ambitious selection, training, supervision, and disciplining of employees, vicarious liability gives employers incentives to consider alternatives to employee efforts. One such alternative might be the mechanization of particular tasks; another might be simply the reduction in the overall scale of the employer's activities[285].

6/148 We would add to *Schwartz's* justifications that vicarious liability may be justified because of the difficulties of proof of employer negligence. In large and complicated commercial enterprises, victims will rarely be able to demonstrate risk-prevention measures that the employer might have instituted to avoid or ameliorate the inevitable risk of human (employee) error. Referring back to the neurosurgeon who repeatedly operated on the wrong side of his patients' heads[286], surely there are systems that could be employed by hospitals to prevent this form of human error that is fortunately rare but nevertheless predictable. Yet we doubt that plaintiffs' lawyers are well situated to identify those systems and prove that the failure to adopt them constitutes negligence.

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284 Basic Questions I, no 6/119.

285 *Schwartz* concludes that these economically based justifications »are promising, yet incomplete«. *Schwartz,* 69 S. Cal. L. Rev. (1996) 1739, 1758.

286 See above no 6/135.

IV. Defective things

The idea of liability for defective things[287] is unknown in the U.S. The anterior question in U.S. tort law in the case of defective things would be identification of the actor responsible for the defective thing either in designing, constructing, maintaining, or otherwise controlling it. That inquiry requires determining whether any such actor has been negligent in some relevant respect. U.S. law also does not recognize any special standards such as »objective carelessness« or »serious fault«. **6/149**

Strict liability for defective products was adopted in the U.S. in the 1960s. Yet the source of the idea for imposing liability for a defective product was not tort law but the law of contract. Sales warranties required that a product be reasonably fit for its intended and ordinary uses, and the failure of a product in such uses violated the expectations of consumers entering into the contract of sale or so the theory behind the implied warranty of merchantability went. **6/150**

V. Dangerousness

We would reiterate that dangerousness is not a distinct theory for liability. Negligence by an actor must be shown. **6/151**

In one area, U.S. law has developed a head of strict liability for activities that are highly dangerous. That law was influenced by the English case of *Rylands v. Fletcher*[288], in which an owner hired an independent contractor to build a reservoir, which flooded a neighbor's land because of abandoned mine shafts of which the owner was unaware. The rationale for employing strict liability for this »nonnatural use« was purely fairness. Defendant has brought something onto his land for his benefit and should bear the loss if there is an escape that causes harm to a neighbor's land. **6/152**

Strict liability for abnormally dangerous activity in the U.S. today is justified based on deterrence. The doctrinal trappings of U.S. law are the same as those contained in the PETL[289], which were modeled on the provisions in the Third Restatement of Torts[290]. The justification, which a number of law and economics scholars worked out in the latter part of the 20th century was expressed by Judge *Richard Posner* in *Indiana Harbor Belt Railroad Co. v. American Cyanamid Co*[291]. Neg- **6/153**

287 Basic Questions I, nos 6/129–135.
288 [1868] L.R. 3 H.L. 330.
289 *European Group on Tort Law,* Principles of European Tort Law art 5:101.
290 See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 20.
291 916 F.2d 1174 (7th Cir. 1990).

ligence provides adequate incentives for safe conduct. But negligence is not applied well to activities because of the difficulties courts would have in adjudicating such matters, such as whether trucking was negligent because of the alternative method of transporting freight by ship. Hence, to both regulate the amount of dangerous activities that are engaged in and to provide incentives for making the activity safer either by developing new safety technology or relocating the activity to a safer location, strict liability is employed.

6/154 Strict liability for abnormally dangerous activity is quite limited in the United States. Courts, rather than juries, are tasked with determining which activities qualify as abnormally dangerous. The number of activities that have been determined to be abnormally dangerous are quite few. In some jurisdictions, it is limited to blasting. In another, by legislation, it is limited to blasting and pile driving. Hazardous waste disposal, nuclear power generation and radioactive material processing are three other areas that some courts have classified as abnormally dangerous[292].

6/155 With regard to the matter of apportionment to others whose tortious conduct enables or facilitates harm caused by an abnormally dangerous activity[293], U.S. law would permit contribution claims employing comparative responsibility as the basis for apportionment. However, our sense is that such situations in which a third party's negligence concurs with abnormally dangerous activity is rare. Also a victim's contributory fault also constitutes a partial defense based on comparative fault, or the better-termed comparative responsibility. While contributory negligence was not a defense to strict liability, the adoption of comparative responsibility has changed that[294].

VI. Economic capacity

6/156 U.S. law has nothing remotely similar to the economic capacity principle employed with regard to children and those acting out of necessity[295]. U.S. law generally views the wealth of a defendant as an irrelevant consideration[296].

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292 See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 20 reporters note to cmt e.

293 Basic Questions I, nos 6/53–55.

294 See Restatement (Third) of Torts: Apportionment of Liability (2000) § 1.

295 Basic Questions I, no 6/164.

296 The one exception of which the authors are aware is with regard to punitive damages. The wealth of the defendant, while not bearing on liability, is often a criterion for determining the appropriate amount of damages that should be awarded. See *Dobbs,* The Law of Remedies[2] § 3.11(5) at 331–333.

VII. Insurance

As with defendant wealth, the existence of liability insurance has traditionally been thought an irrelevant consideration in determining liability or the appropriate amount of compensatory damages (many jurisdictions do not permit insurance for punitive damages)[297]. Indeed, any mention of a defendant's liability insurance is excluded from trial for the fear that a legally irrelevant matter may nevertheless influence jury decision making[298]. **6/157**

Nevertheless, influenced by scholars such as *Fleming James* in the middle of the 20th century, some courts adopted a »loss spreading« rationale to justify strict products liability[299]. On this account, compensating the victim of a catastrophic loss would minimize the social cost of the harm and other product users could, in effect, be taxed for the costs of that compensation. The idea is based on the principle of insurance, albeit imposed by law[300]. From this account, the matter of whether the defendant was or could have insured became a criterion for imposing strict products liability[301]. **6/158**

Another area in which the presence of liability insurance played a decisive role was in the breakdown of family immunities. At first cut, it might seem pointless for one member of an intact family to sue another member. U.S. law had, for many years, employed a family immunity doctrine that prevented such suits (whether they made sense or not) on the grounds of family harmony. However, many courts in recent years have removed that immunity, influenced by the availability of liability insurance (auto or homeowners) that would cover any intra-family liabilities. Finally, we would observe in response to § 829 BGB and § 1310 ABGB, which take into account the existence of liability insurance[302], such a rule may, perversely, influence children or those with mental illness to avoid insuring themselves. We would also observe that many large enterprises choose to self-insure and others only have insurance for liabilities above a certain amount, self insuring for all less than the designated threshold. **6/159**

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297 See *C.M. Sharkey,* Revisiting the Noninsurable Costs of Accidents, 64 Maryland Law Review (2005) 409, 454 and FN 224.

298 See Federal Rules of Evidence (Fed. R. Evid.) 411 (»Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.«).

299 See *F. Fleming, Jr.,* Products Liability, 34 Tex. L. Rev. (1956) 44. *Guido Calabresi,* as well, advocated loss spreading as a means to reduce social cost. See *Calabresi,* Accidents 51–54.

300 Employing tort law to provide loss spreading has come under considerable scholarly criticism. See *Polinsky/Shavell,* 123 Harv. L. Rev. (2010) 1437, 1465–1469.

301 See *Escola v. Coca Cola Bottling Co. of Fresno,* 150 P.2d 436, 440, 441 (California 1944) *(Traynor, J.,* concurring) (»The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.«).

302 Basic Questions I, no 6/177.

VIII. Risk communities

6/160 We discuss automobile accidents separately from product accidents for purposes of the idea of a risk community. With regard to products, often there is market differentiation that results in some purchasing safer products while others purchase more risky versions of the same product. Automobiles are an excellent example of this with large luxury products providing more protection and greater safety technology than smaller economy vehicles. Thus, the *Widmer* vision[303] of a risk community does not operate in practice in some product markets. Moreover, even in product markets with generic, equal risk products, each consumer will pay the same premium for protection from defect-caused injury. Yet, those with larger incomes would be provided greater protection than those with smaller incomes or the retired or unemployed. Thus implementing a product risk community could result in the less wealthy subsidizing the more wealthy. Private insurance would not entail such subsidies.

6/161 With regard to automobile accidents, third-party liability insurance poses similar cross-subsidy concerns. The wealthy will recover more when injured than the poor, yet pay no more in insurance premiums on that account. In addition liability insurance is an expensive way, even if strict liability is employed, to provide compensation[304]. Instead, mandatory first-party insurance would provide compensation more efficiently and tailored to the needs of each insured who could obtain sufficient coverage to replace his or her lost income due to injury. Moreover, first-party insurance is attractive with regard to motorists because deterrence plays a diminished role in this context where deficient driving behavior poses not only risks to others but also to the driver him- or herself. Efforts to enact legislation providing for no-fault automobile insurance had modest success in the U.S. in the 1970s, but have stalled in subsequent years largely because of political opposition from trial lawyers[305].

303 Basic Questions I, no 6/181.

304 Third-party liability insurance is variously estimated as having between three and five times the administrative costs of first-party insurance. See *F. Fleming, Jr.,* Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal, 25 Vand. L. Rev. (1972) 43, 52 (administrative costs of liability insurance are 56 %, while limited to 18 % for first-party insurance); *G. Priest,* The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. (1987) 1521, 1588 (administrative costs for liability insurance are five times that for first-party health insurance).

305 See *J.M. Anderson/P. Heaton/S.J. Carroll,* The U.S. Experience with No-Fault Automobile Insurance: A Retrospective (2010).

IX. Burden shifting and greater liability

6/162 We would make explicitly a point that is implicit in the discussion of burden shifting in Basic Questions I[306]. Burden shifting may be adopted not to impose a higher standard of liability but to extract evidence from the defendant who otherwise has no incentive to provide any evidence in its control that bears on fault. In addition, burden shifting may be used with regard to elements other than fault for the same purpose or because of fairness in imposing the risk of unavailable evidence on the culpable party rather than on the innocent victim[307].

X. A blended standard

6/163 Our sense is that most U.S. observers would align themselves with *Johann Neethling*[308] and assert that fault-based liability and strict liability for abnormally dangerous activity are two distinct bases for liability. Abnormally dangerous activity is, as explained above, a relatively minor aspect of U.S. tort law. We are hard pressed to identify intermediate positions between these two established bases for liability. Moreover, we are inclined to resist the claim that requiring greater care when the risk is greater entails a deviation from fault-based liability. The standard of care is one of reasonableness, and when there is greater risk, more care would be exercised based on this reasonableness standard. The *Learned-Hand formula,* similarly, while remaining static would call for assuming a higher degree of care when the risk posed increases. This is fault-based liability not a hybrid between fault and strict liability, or so most U.S. courts would reason[309].

306 Basic Questions I, nos 6/184 and 186.

307 See eg *Haft v. Lone Palm Hotel,* 478 P.2d 465 (California 1970).

308 *J. Neethling,* South Africa, in: B.A. Koch/H. Koziol (eds), Unification of Tort Law: Strict Liability (2002) 269 (cited after Basic Questions I, no 6/188).

309 See *Bethel v. New York City Transit Auth.,* 703 N.E.2d 1214, 1216 (N.Y. 1998) (»The objective, reasonable person standard in basic traditional negligence theory, however, necessarily takes into account the circumstances with which the actor was actually confronted when the accident occurred, including the reasonably perceivable risk and gravity of harm to others and any special relationship of dependency between the victim and the actor«).

XI. Enterprise liability

6/164 Apart from products liability, there is very little enterprise liability in the U.S.[310] The idea of liability for a defect in a building or enterprise is unknown in the U.S. It is the case that *Greg Keating,* a prominent U.S. torts scholar, has been a vigorous advocate for enterprise liability and claims to find significant strains of enterprise liability in modern tort law, but he is a distinct minority in that view[311].

XII. Products liability

6/165 Strict products liability developed in the U.S. in the 1960s in the midst of a progressive era when society was looking to have government provide stronger safety nets to ameliorate the risks confronted by Americans over their life cycle. Moreover, strict products liability developed not in place of fault-based liability but in place of substantial pockets of no liability because of courts' reluctance to apply a full-throated negligence standard to product manufacturers[312]. No – or at least less

310 Thus, we would resist the characterization in Basic Questions I, that the U.S. is part of a strong trend toward »more stringent damage liability for entrepreneurs« (no 6/192). *Gary Schwartz,* in an article cited in Basic Questions I, convincingly refutes *George Priest's* claims of the rise of Enterprise Liability. See *G.T. Schwartz,* The Beginning and the Possible End of the Rise of Modern American Tort Law, 26 Ga. L. Rev. (1992) 601. Since *Schwartz's* article the retreat from strict liability for products has continued such that there is quite little strict remaining in products liability. See below no 6/166; *G.G. Howells/M. Mildred,* Is European Products Liability More Protective than the Restatement (Third) of Torts: Products Liability? 65 Tennessee Law Review (1998) 985; *A. Awad,* The Concept of Defect in American and English Products Liability Discourse: Despite Strict Liability Linguistics, Negligence Is Back with a Vengeance! 10 Pace International Law Review (1997) 275.

311 As *Keating* acknowledges, »the theory of enterprise liability does not make any appearance at all in the Restatement (Third): General Principles [since renamed Liability for Physical and Emotional Harm]«. *G.C. Keating,* The Theory of Enterprise Liability and Common Law Strict Liability, 54 Vand. L. Rev. (2001) 1285, 1288. For other academic support for enterprise liability, see *V.E. Nolan/E. Ursin,* Understanding Enterprise Liability: Rethinking Tort Reform for the Twenty-first Century (1995).

312 See eg *Sawyer v. Pine Oil Sales Co.,* 155 F.2d 855, 856 (5th Cir. 1946) (applying Louisiana law) (rejecting negligence claim when cleaning preparation splashed into plaintiff's eye, causing permanent injury, in part because »the cleaning preparation was not intended for use in the eye.«); *Simmons v. Rhodes & Jamieson, Ltd.,* 293 P.2d 26 (California 1956), *Dalton v. Pioneer Sand & Gravel Co.,* 227 P.2d 173 (Washington 1951) (in both Simmons and Dalton, refusing to let the cases go to the jury because plaintiffs were concrete workers who should have known of concrete's caustic qualities); *Imperial v. Central Concrete, Inc.,* 146 N.Y.S.2d 307 (App. Div. 1955) (holding that wet cement was not a dangerous substance), aff'd, 142 N.E.2d 209 (N.Y. 1957) 151 A.2d 731 (1959) (dangers of wet cement obvious to cement workers); *Frank v. Crescent Truck Co.,* 244 F.2d 101 (3d Cir. 1957) (applying New Jersey law) (finding an unusual use and no proximate cause when a fork lift operator failed to keep his foot on a platform claimed to be too narrow,

than full – liability better reflected that era because of difficulties of proof faced by victims in demonstrating seller fault and because of impediments to warranty liability[313]. Moreover, the focus of strict products liability was on products that failed dramatically in the course of their ordinary use: soda bottles that exploded[314]; lathes that failed to hold stock that was locked in place[315]; and lawn furniture that had such sharp hidden pieces as to amputate the tip of a user's finger[316]. To be sure, the strict products liability that was adopted rested in part on loss spreading and enterprise liability rationales, but a variety of policies were argued to support this development. The »strict« in strict products liability was borrowed from sales law and its implied warranty of merchantability not any tort doctrine that supported strict liability being applied to product manufacturers.

Despite courts' dalliance with finding something strict to apply to design defects and warnings, U.S. law today largely employs a negligence standard to determine whether such a defect exists[317]. While strict liability does exist for manufacturing defects and products that fail dramatically to perform safely in the ordinary course of their use, both of those areas might be justified on the ground of the difficulties of proof of negligence confronted by injured victims. **6/166**

XIII. Comparative responsibility

The U.S. is another country justifying the statement in Basic Questions I that comparative responsibility is »common nowadays to almost all legal systems.«[318] **6/167**

causing it to be crushed against a wall); see generally *D. Noel,* Manufacturer's Negligence of Design or Directions for Use of a Product, 71 Yale L.J. (1961) 816.

313 See *M.D. Green,* The Unappreciated Congruity of the Second and Third Restatements on Design Defects, 74 Brooklyn Law Review (2009) 807, 815 (»most academics were concerned with the various impediments to imposing liability – such as the privity barrier and other warranty law limitations«.).

314 See *Escola v. Coca Cola Bottling Co. of Fresno,* 150 P.2d 436 (California 1944).

315 See *Greenman v. Yuba Power Prod., Inc.,* 377 P.2d 897 (California 1963).

316 See *Matthews v. Lawnlite Co.,* 88 So.2d 299 (Florida 1956).

317 The apogee of this dalliance occurred in *Beshada v. Johns-Manville Products Corp.,* 447 A.2d 539 (New Jersey 1982). The New Jersey Supreme court declared irrelevant the defendants' claims that the dangers of asbestos were not foreseeable at the time their products had been manufactured. Foreseeability of risk, the court ruled, was irrelevant to strict products liability. Within 18 months, the court backtracked, providing a state of the art defense to a drug manufacturer who alleged that the risks of its drug were unknown at the time plaintiff used it. See *Feldman v. Lederle Labs,* 479 A.2d 374 (New Jersey 1984). The Third Restatement requires that risks be foreseeable (and proved by plaintiff) for both warning and design defects. See Restatement (Third) of Torts: Products Liability (1998) § 2(b)-(c).

318 Basic Questions I, no 6/204. Although comparative responsibility is the overwhelming rule among the states, currently there are five that still adhere to contributory negligence as a com-

We should add that the majority of states adopting a comparative responsibility scheme have employed what is known as a »modified« type, such that a plaintiff who is more than 50 % at fault is barred from recovery[319].

6/168 We are skeptical of the claim, often made by law and economics scholars, and also stated in Basic Questions I, that comparative responsibility serves deterrence purposes[320]. According to this account, tort law must provide incentives for potential victims to avoid risky conduct that threatens themselves. As we explain above, particularly with regard to personal injury, there are quite substantial incentives already in place that deter behavior creating risk to self[321]. Indeed, in many cases involving momentary inadvertence by individuals, an aspect of the human condition that law may not have much sway with, we are inclined to think that imposing full liability on the negligent injurer, especially if an enterprise, would do more for deterrence than imposing partial liability on the victim. Thus, our view is that the reason for reducing recovery due to victim negligence is related to fairness and the idea that when two persons are each negligent in causing injury, liability should be shared between them, rather than visited entirely on one or the other of the persons.

6/169 We are a bit confused about the discussion in Basic Questions I of the application of the principle of responsibility with regard to plaintiff fault[322]. Basic Questions I suggests that only victim conduct that would make the victim liable to a third party constitutes comparative responsibility[323]. Much that might constitute fault by a victim poses risks only to the victim and not to third parties. For example, a homeowner who carelessly climbs a ladder creates risks only to the homeowner. If apportionment were limited to those instances when a victim's unreasonable conduct *also* poses risk to third parties, it would be far more constrained than is the practice in the U.S. To be sure, some faulty conduct may pose threats both to the self and others, as in the case of careless driving, and for such a plaintiff a larger apportionment of comparative responsibility is justified based on having created risks to both self and others[324].

6/170 We are even more bemused by the differentiation theory[325], which has no counterpart in the U.S. If we understand it correctly, it seems nonsensical to insist that because the plaintiff always plays a causal role, some liability must be

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plete bar to recovery. See Restatement (Third) of Torts: Apportionment of Liability (2000) § 7 reporters note to cmt a.

319 See Restatement (Third) of Torts: Apportionment of Liability (2000) § 7 reporters note to cmt a.

320 Basic Questions I, no 6/204.

321 See above no 6/20.

322 Basic Questions I, no 2/204; no 6/206.

323 At another point, Basic Questions I, no 6/216 suggests that comparative responsibility concerns conduct posing risks only to oneself.

324 See Restatement (Third) of Torts: Apportionment of Liability (2000) § 3 cmt a.

325 Basic Questions I, no 6/209.

apportioned to him, even if his conduct is non-culpable. Liability is not imposed for non-tortious conduct by injurers, and we cannot understand the claim why it should be different for victims. Yes, it is true that tort law declines to shift losses that are not tortiously caused, but it does so not so that the loss is imposed on the victim but rather because there is no good reason to shift the loss[326]. Tort law has nothing to say about other sources of compensation that may be available to a victim, including disability or health insurance, which can serve to shift the victim's loss.

6/171 We concur that conduct that poses risks *only* to oneself is, outside the torts context, not culpable[327]. Freedom with regard to one's own affairs justifies such assessments. However, when conduct that is risky only to oneself concurs with the tortious conduct of another, the other has a strong claim that the victim's risky conduct should be taken into account in determining liability. That claim is based both on fairness and, in the minds of law and economics scholars, on deterrence[328]. All other things being equal, behavior that only poses risk to oneself might be adjudged comparatively less seriously than an actor's conduct posing risk to others. Nevertheless, U.S. law reasons very differently from that described in Basic Questions I about Austro-Germanic law[329]. Assuming that a victim's conduct meets the threshold of unreasonably posing risks (and we assume for this discussion only to the victim), then the lesser culpability of the victim would be reflected in an apportionment of the degree of fault (and thereby in responsibility for the costs of the harm) to the victim and concomitantly with greater comparative responsibility (and liability for the harm) being placed on the defendant.

6/172 Before the advent of comparative responsibility, victim behavior was judged more leniently with regard to whether it was unreasonable. That differential standard was justified because of the inequity of contributory negligence, which imposed the costs of an accident entirely on one of two faulty behaving parties. With the adoption of comparative responsibility, that principle has been replaced with the rule that »Plaintiff's negligence is defined by the applicable standard for a defendant's negligence.«[330] Ameliorative doctrines, such as last clear chance, which negated victim fault when the injurer had the last clear chance to avoid the accident, have also been eliminated[331].

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326 Thus, we would resist the idea that there is a »general rule for risk-bearing on the part of the victim«. Basic Questions I, no 6/213. Rather we would state it as there is a »rule that liability is not imposed unless an injurer satisfies the elements for tort liability«.

327 We note that frequently the same conduct that risks injury to oneself also poses risks to others.

328 We have already expressed skepticism about that claim with regard to deterring behavior that risks personal injury to oneself, above no 6/168.

329 Basic Questions I, no 6/218.

330 See Restatement (Third) of Torts: Apportionment of Liability (2000) § 3 cmt a.

331 See Restatement (Third) of Torts: Apportionment of Liability (2000) § 3.

Part 7 Limitations on liability

I. Proximate cause or scope of liability

6/173 We would wholeheartedly endorse, from a U.S. perspective, the need for an additional limiting element as an aspect of tort liability because of the scope that employing an unadorned sine qua non test would produce. We also concur that this limitation is, unlike factual causation, a normative inquiry. We would also plead guilty, on behalf of historical tort law in the U.S., of confusion borne of using »legal cause« as an umbrella term to include both factual causation and limitations on liability[332]. Indeed, with the more popular term »proximate cause« used to variously mean both cause and limitations, just factual cause, or just limitations of liability, much confusion has been spawned in U.S. tort law[333]. The confusion is not only a result of using the same terms to mean different things but also of failing to clearly distinguish the largely objective determination of factual cause from the normative assessment of how far to trace defendant's liability[334].

6/174 We can also report hopefully on the Third Restatement's effort to repair this confusion. Like the PETL, the Restatement consciously separates factual causation from liability limitations[335]. Moreover, it adopts entirely new terminology, rejecting legal cause and proximate cause and, instead adopting factual cause and scope of liability to describe these two elements. Whether the Third Restatement can dislodge traditional and entrenched usage remains an open question in the U.S. right now[336].

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332 The first two Restatements of Torts employed »legal cause«, requiring that »the negligence of the actor be a legal cause of the other's harm«. Restatement (Second) of Torts (1965) § 430; Restatement of Torts (1934) § 430. The Restatements' terminology never gained popular support and instead »proximate cause« was often used, at times, to express both factual cause and liability limitations. See *Dobbs,* The Law of Torts § 167, at 408 (»Courts often lump the two issues together under the rubric of ›proximate cause.‹«).

333 See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 26 cmt a.

334 Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 29 cmt g; see also *Eldredge,* 86 U. Pa. L. Rev. (1937) 121, 123 (»All too frequently the language of opinions serves only to obscure the real problem by discussing the two separate questions as one …«.).

335 Compare Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) §§ 26–36 (employing separate chapters to address factual cause and scope of liability) with PETL arts 3:101–201 (employing different sections, albeit within the same chapter, to address both elements).

336 One heartening piece of evidence is the Iowa Supreme Court's adoption of »scope of liability« in *Thompson v. Kaczinski,* 774 N.W.2d 829 (Iowa 2009), even before the Third Restatement was finally published.

We should finally explain one anomaly in U.S. law with regard to limitations on liability. Basic Questions I reflects the traditional view that once a faulty act that violates a duty occurs, »the violation does not need to relate to the further consequences.«[337] In perhaps the most famous tort case in the U.S. of all time, *Palsgraf v. Long Island Railroad Co.*[338], Judge *Cardozo* insisted that duty and negligence were limited by the harms that could be foreseen at the time of the negligent act. »[N]egligence in the air, so to speak, will not do.«[339] Thus, the defendant railroad was not liable for harm to the plaintiff who had been standing on a railroad platform, some distance from the tracks. Two employees of the defendant assisted a passenger who was hurriedly attempting to board a train. During that time, the passenger dropped a small package wrapped in newspaper that contained fireworks. The fireworks exploded when the package hit the ground. Plaintiff was injured when shock waves from the blast caused a scale where plaintiff was waiting to fall on her. **6/175**

According to *Cardozo,* while the risk of harm to the embarking passenger or perhaps others in the immediate vicinity would support duty and breach by the railroad employees as to them, the acts were not a wrong in relation to the plaintiff. Thus, *Cardozo* declared, the »law of causation, remote or proximate«[340] was not involved in the case because there was no duty to the plaintiff. In *Cardozo's* conceptualization, then, duty is relational rather than act based. **6/176**

Palsgraf had two important aspects to it. First, it shifted much of what had been dealt with as scope of liability – the matter of plaintiff foreseeability – to the duty inquiry, requiring an assessment of which persons were foreseeably at risk of harm at the time of the defendant's act. Foreseeability, of course, is one of the tests commonly employed for scope of liability. The practical importance of that change in the U.S. is that it shifted the determination of scope of liability from the jury (where it is treated as a factual matter[341] and therefore for jury determination) to the court where duty is treated as a matter of law. **6/177**

By contrast with *Cardozo,* Judge *Andrews,* dissenting, asserted duty arises from acts that create risk and such a duty is owed »to the world at large.«[342] The *Andrews* expansive vision of duty then left to scope of liability (then, proximate cause) the question of how far liability would extend. **6/178**

337 Basic Questions I, no 7/3.

338 162 N.E. 99 (N.Y. 1928).

339 162 N.E. 99 (N.Y. 1928) (quoting *F. Pollock,* Torts[11] [1920] 455).

340 162 N.E. 99, 101 (N.Y. 1928).

341 Of course, scope of liability is not a factual matter, but instead requires a normative assessment of how far liability should be extended, even if the legal standard for scope of liability constrains that assessment. Because the facts necessary for making the assessment are specific to the case, juries have been assigned the task of deciding this element, while duty is a legal matter for the court.

342 162 N.E. 99, 105 (N.Y. 1928).

6/179 Many contemporary U.S. observers believe that *Palsgraf's* influence has largely faded and while an important historical matter, it is not of contemporary significance. A recent article finds more of *Palsgraf* than many of those observers appreciate. The author writes that »As to the proper doctrinal home for plaintiff-foreseeability, *Cardozo* has undoubtedly prevailed … a clear majority of jurisdictions state that duty is the proper home for plaintiff-foreseeability … «[343].

II. »Breaking the causal chain«

6/180 Personally, we wholeheartedly concur with Basic Questions I's assessment of the oft-expressed idea that an intervening act breaks the causal chain connecting defendant's tortious act and the plaintiff's harm[344]. Nevertheless, we must report that there is quite a bit of that language masquerading as analysis in U.S. court decisions. As Basic Questions I correctly explains, this idea of severing the causal chain has nothing to do with factual causation and instead addresses the matter of scope of liability. The role of an intervening act, therefore, should be addressed and analyzed as the liability-limiting doctrine it is, rather than by invoking the metaphysics of breaking causal chains[345].

III. The standard for determining scope of liability

6/181 We are unable to assess the theory of adequacy in Basic Questions I[346]. Perhaps because it is unfamiliar or perhaps because of the variations that exist preventing a more concrete explanation of its content, we are unable to comprehend what this theory entails. As to remote damage being excluded, the explanation that it was not controlled by the actor is unpersuasive to U.S. sensibilities. An individual who fails adequately to secure a dangerous firearm loses control over it once a third person obtains possession because of the lack of security, but that loss of control would not be a recognized ground for excluding the owner's liability. Similarly, we are unpersuaded by the deterrence argument. Deterrence theory would counsel in favor of liability if an actor creates some foreseeable risk through a negligent

343 *W.J. Cardi,* The Hidden Legacy of Palsgraf: Modern Duty Law in Microcosm, 91 Boston University Law Review (2011) 1873, 1913.

344 Basic Questions I, no 7/6.

345 See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 34 and cmt b.

346 Basic Questions I, nos 7/7–14.

act, but other, unforeseeable harm occurs. Indeed, a full-throated commitment to deterrence would obviate the need for any scope of liability limitation, as once an actor has been found to have created excessive risk, liability is appropriate regardless of the connection to the harm that ensues[347].

6/182 We think that what Basic Questions I identifies as the protective purpose theory[348] is equivalent to the U.S. harm-within-the-risk rule. This »HWR« rule employed to limit liability is one of several that exist and are employed in U.S. jurisdictions today[349]. HWR asks whether the risk that resulted in the plaintiff's harm is among the risks that were the basis for holding the defendant liable[350]. This limitation can be employed for negligence and strict liability torts, as it focuses on risks rather than faulty conduct. Thus, if strict liability applies to the storage of dynamite, an actor engaged in such conduct would not be liable for harm occurring if a package of dynamite fell on another person causing a broken toe. Dynamite falling on persons is not a risk included in the reason for holding those who store dynamite strictly liable.

6/183 This rule, characterized in different terms, is employed to limit liability for violating statutory safety provisions when such violations result in harm. Thus for liability to be imposed, the harm must be among those that the statutory provision was designed to prevent and the victim must be in the class of persons that were to be benefitted by the safety provision[351]. Application in the context of specific safety statutes is considerably easier because of the narrower focus of safety statues by comparison to the negligence cause of action, which potentially encompasses all conduct posing risks to others.

IV. Lawful alternative conduct: factual cause or scope of liability?

6/184 Addressing the hypothetical of the car driver overtaking a cyclist[352], we see no difficulty with resolving that case on the grounds of factual cause. To ask the counter-factual inquiry required for factual case – would the outcome be different if

347 See *S. Shavell,* Economic Analysis of Accident Law (1987) 113. *Posner* and *Landes* justify scope of liability provisions on administrative costs grounds. See *Landes/Posner,* Economic Structure 246–248.

348 Basic Questions I, nos 7/15–21.

349 See *J.A. Page,* Torts: Proximate Cause (2003).

350 See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 29.

351 Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 14.

352 Basic Questions I, no 7/22.

the tortious conduct[353] had not occurred? – the answer is plainly no. Since the tortious conduct was leaving insufficient space and since even if the driver had left sufficient space the same harm would have occurred, the driver's tort is not a factual cause of the harm. Thus, the car driver is not liable because factual cause is absent – it would have happened anyway. The outcome would be the same in the informed consent hypothetical also contained in Basic Questions I[354].

6/185 While it is true, as Basic Questions I explains[355], that in both of these hypotheticals and more generally in this class of cases that the other event is merely hypothetical and did not occur, we do not think that fact is of consequence. Necessary for any factual causal inquiry is a counter-factual hypothetical inquiry: what would have happened in the world if the defendant had not engaged in the tortious conduct?[356] Thus, the fact that the alternative force that would also produce the harm is merely hypothetical is merely a consequence of the necessity of the causal inquiry and not an objection to the no-cause conclusion. Thus, U.S. law and analysis would align itself with the »great majority« identified in Basic Questions I[357]. Indeed, U.S. lawyers would have difficulty understanding »the doubtless still prevailing view.«[358]

6/186 With regard to the concern for deterrence expressed in Basic Questions I about the informed consent case, there is an alternative and theoretically more satisfying approach than holding the physician liable for harm that she did not cause. Rather, what the physician deprived her patient of was an autonomy interest in having the opportunity to make an informed assessment of whether to pursue the medical intervention, as stated in Basic Questions I[359]. If courts recognized that interest as compensable, then liability could be imposed and would be determined based on the harm caused rather than on other harm not caused[360].

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353 We should explain that it is the tortious conduct rather than the entirety of the actor's conduct that must be removed in conducting the counter-factual inquiry. »Tortious conduct must be a factual cause of harm for liability to be imposed«. Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 26.

354 See *Rinaldo v. McGovern,* 587 N.E.2d 264 (New York 1991) (golfer's failure to shout »fore« in advance of striking the ball not a cause of harm to victim hit by the ball because a warning »would have been all but futile«); *Tollison v. State of Washington,* 950 P.2d 461 (Washington 1998) (adoption agency not liable for failing to provide information about prospective adoptee required by law because adoptive parents admitted they would have gone forward even if provided the information).

355 Basic Questions I, no 7/23.

356 See *D.W. Robertson,* The Common Sense of Cause in Fact, 75 Tex. L. Rev. (1997) 1765, 1769–1771.

357 Basic Questions I, no 7/25.

358 Basic Questions I, no 7/26.

359 Basic Questions I, no 7/33.

360 See *A.D. Twerski/N.B. Cohen,* Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation, University of Illinois Law Review (1988) 607.

In the view of these authors, there is also no cause to adopt a proportional li- 6/187
ability scheme in the lawful alternative cause situation. A basic principle of tort law is that tortfeasors are not liable for harm that they have not caused. Lawful alternative cause is merely another way of analyzing factual causation, and does not provide a reason to abandon this basic principle.

V. Intervening acts

There is much in U.S. tort law that exempts a tortfeasor from liability when an in- 6/188
tentional intervening act by a third party is also a factual cause of the harm. Much of this law relies on conclusory invocations of »superseding causes« and »breaking the chain of causation«. A provision in the Second Restatement of Torts has also frequently been invoked and quoted by courts:

There is no duty so to control the conduct of a third person as to prevent him 6/189
from causing physical harm to another unless:

a. a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct; or
b. a special relation exists between the actor and the other which gives to the other a right to protection[361].

Courts invoking this provision, however, fail to appreciate that it was addressing 6/190
the matter of affirmative duties – the obligation to protect another from risks created solely by the third person and that the provision was not addressed to the circumstance when a tortfeasor had also contributed to the risk of harm to the victim. The Third Restatement of Torts attempts to correct misuse of section 315: »The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party.«[362]

We, thus, are not attracted to the reasoning described in Basic Questions I 6/191
that liability should not be imposed because of the independent decision of a third party that produced the harm[363]. First, we would observe that, notwithstanding the independent decision, the tortfeasor's wrongful act also produced the harm. Second, as a matter of fairness, we cannot understand why an actor who negligently gives a firearm to an unqualified individual who then fires it under inappropriate circumstances should be absolved of liability and the harm left to fall on the victim.

361 Restatement (Second) of Torts (1965) § 315.
362 Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 19.
363 Basic Questions I, no 7/35.

6/192 Thus, we find ourselves in accord with Basic Questions I's suggestion that one must look to the »protective purpose of the behavioral rule violated«[364]. If the reason the firearm owner was negligent in the above hypothetical was the risk that an unqualified person would not safely use the firearm, exempting the owner from liability when precisely that event occurs seems perverse. The Third Restatement reflects these views in its treatment of scope of liability providing that when independent acts also are a cause, »an actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious«[365]. The Restatement also observes that with much better tools for apportioning liability, that is, on a comparative responsibility basis, there is reduced necessity for the all or nothing approach of exemption that had previously held substantial sway. It also acknowledges that the scope of liability rule for intervening acts is the same as the general scope of liability rule, thereby revealing that there is nothing specially significant about the intervention of a third party[366].

VI. Limits on liability

6/193 No limits on liability for those held strictly liable exist in the U.S. Arguments in favor of such limits on similar grounds to those identified in Basic Questions I[367] have been expressed by scholars who invoke the limited damages available in no-fault based workers' compensation[368]. U.S. courts, perhaps reflecting their view about the appropriate scope of common law courts, have not responded to these entreaties.

6/194 However, tort reform legislative efforts in the U.S. have resulted in limiting damages recovery in the U.S. This legislation does not address the theoretical arguments for limited liability in exchange for lesser liability standards but instead stand on the pragmatic ground of reducing liability in areas where there is a perceived crisis in the costs of liability insurance. Limits on recovery of non-pecuniary damages in medical malpractice cases is the most common such legislation[369].

364 Basic Questions I, no 7/37.
365 Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 34.
366 Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 34.
367 Basic Questions I, no 7/41.
368 See *V.E. Nolan/E. Ursin,* An Enterprise (No-Fault) Liability Suitable for Judicial Adoption – with a »Draft Judicial Opinion«, 41 San Diego Law Review (2004) 1211, 1226 f. Others, who championed loss spreading and enterprise liability ideas, concurred that damages should not be as generous with this more expansive form of liability. See eg *F. Fleming, Jr.,* Damages in Accident Cases, 41 Cornell Law Quarterly (1956) 582.
369 See <http://www.atra.org/issues/noneconomic-damages-reform> (last visited 2.2.2013).

6/195 In the end, whether limits on damages will make liability insurance more affordable and the extent to which such limits will reduce insurance premiums is an empirical matter. The question has been the subject of considerable research in the U.S. in an effort to determine whether damages reform has ameliorated the high cost of medical malpractice insurance. A recent review of 16 studies that addressed the question concluded that because of various methodologies employed, flaws in study design and different outcomes, no strong conclusion could be reached about the relationship between capping damages and medical malpractice insurance premiums[370].

370 See *K. Zeiler/L.E. Hardcastle,* Do Damages Caps Reduce Medical Malpractice Insurance Premiums?: A Systematic Review of Estimates and the Methods Used to Produce Them, in: J. Arlen (ed), Research Handbook on the Economics of Torts (2013).

Part 8 Compensation of damage[371]

6/196 In the U.S., the theory of compensation is the same as expressed in Basic Questions I[372]; a tortfeasor should restore the victim to the state that existed prior to the damaging event[373]. The generality of the theory and pragmatic impediments to implement the theory create a host of difficult and interesting issues in tort compensation in the U.S.[374] As well, damages vary depending on the type of harm, personal injury, reputational, economic loss, etc, suffered by the victim[375].

I. Lump sum or periodic payments

6/197 In the U.S., future losses have been awarded as a lump sum, reflecting the administrative efficiency of doing so as well as to provide encouragement for the victim to move on with his or her life[376]. That is also true for victims who are at risk of suffering additional injury in the future – they must recover damages for the anticipated injuries in the initial action[377]. The disadvantage, of course, is that determining future losses can be problematic. With regard to lost profits, courts often permit juries to decide the appropriate amount of damages based on evidence that is less robust than is ordinarily required as to what the future earnings of the plaintiff would have been because of the difficulties of proof. On the other hand, a minority of jurisdictions in the U.S. employ a categorical rule prohibiting a new

371 U.S. tort terminology would refer to the monetary relief provided a victim as »damages«. »Damage« would rarely be used to refer to harm or injury. See eg Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) § 4 (defining »physical harm«).

372 Basic Questions I, no 8/1.

373 See *Franklin/Rabin/Green,* Tort Law and Alternatives[9] 710.

374 To pick just one at random: should an undocumented alien who has been working illegally recover lost wages if a tortious injury prevents him from working?

375 See *Dobbs,* The Law of Remedies[2] § 3.3(1), at 220.

376 See *Dobbs,* The Law of Remedies[2] § 3.1, at 216; see also *R.C. Henderson,* Designing a Responsible Periodic-Payment System for Tort Awards: Arizona Enacts a Prototype, 32 Ariz. L. Rev. (1990) 21 (addressing the benefits and disadvantages of a periodic payment scheme).

377 Most jurisdictions require plaintiff to prove such future harm will occur by a preponderance of the evidence. A notable exception is *Dillon v. Evanston Hosp.,* 771 N.E.2d 357 (Illinois 2002), in which the court allowed recovery for future injury based on the probability such future harm would occur even if below the threshold preponderance standard of proof.

business from recovering future lost profits because of the speculative nature of the prospects of such a new venture[378].

The strong default in the U.S. is for the »single-judgment rule«, which requires all damages for a tortious injury to be recovered in one action. However, in the 1970s, a handful of jurisdictions enacted periodic payment statutes that provide for payments to be made over time and for the payments to cease when the need, such as the death of the victim, expired. Such statutes were limited to medical malpractice cases, influenced by the perceived crisis in medical liability insurance policies, and have not expanded to other tort areas or additional jurisdictions[379]. **6/198**

II. Reduction of Damages

In the U.S., there is no counterpart to the reduction clauses discussed in Basic Questions I[380]. Because such a provision is unknown, there is no discussion of such a provision in tort law scholarship of which we are aware. A defendant subject to a ruinous judgment would be free to seek relief in a bankruptcy court, although judgments for intentional torts are not eligible for discharge. As discussed above, plaintiff's lawyers infrequently seek execution from individuals who have no insurance or whose liability insurance is inadequate to cover the full liability[381]. **6/199**

Perhaps because of these practical limitations on ruinous liability in the U.S., we do not find persuasive the arguments for adoption of such a reduction clause. While a large judgment may prove ruinous to a culpable defendant, failing to recover damages after a significant injury can also prove highly detrimental to the victim. Basic Questions I argues that reduction »can leave the tortfeasor with more than just the minimum subsistence level and thus allow him a certain possibility of development.«[382] That argument appears to us to be one for unadorned wealth shifting – money provided to those who are poor can help them more than leaving the money with someone wealthier. Such an argument, if accepted, might entitle a victim of a catastrophic loss to seek payment from another even though that individual is not liable in tort for the loss. **6/200**

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378 *T.R. Smyth,* Recovery of Anticipated Lost Profits of New Business: Post-1965 Cases, 55 American Law Reports (A.L.R.) 4th 507.

379 See eg *Smith v. Myers,* 887 P.2d 541 (Arizona 1994) (holding state periodic payment statute unconstitutional).

380 Basic Questions I, nos 8/24–29.

381 See above no 6/139.

382 Basic Questions I, no 8/27.

Part 9 Prescription of compensation claims

6/201 An American lawyer would concur with much of what is said by way of introduction to the prescription of claims (statutes of limitations in the U.S. legal lexicon) in Basic Questions I[383]. That U.S. lawyer might resist the idea that prescription is designed to prevent unfounded claims, as there is no evidence of which we are aware that there is a relationship between the delay in filing and the merits of the action. Prescription does serve the dual purpose of preventing litigation of a case with stale or absent evidence and providing repose to potential defendants once the period has expired for bringing suit. The penalty imposed on a victim in the event of missing the prescribed time is particularly harsh – the claim is lost. Such a penalty is justified on the grounds of deterrence – providing incentives for promptly filing suit – and reducing the transactional costs that would otherwise exist with a laches rule that inquired in every case into whether evidence in the case had been compromised by plaintiff's delay in filing suit. If the incentives provided by prescription rules are successful, the penalty for running afoul of them will infrequently be invoked. Unlike the suggestion in Basic Questions I that public interests are involved[384], prescription is viewed in the U.S. as essentially only a balancing of private rights and administrative costs.

6/202 We would add that while generally the idea that delays in the initiation of suit will disadvantage the defendant because of lost or deteriorated evidence that would assist the defendant in mounting a defense, that is not universally the case. In several mass toxic torts in the U.S. in recent decades, the critical question has been causation – whether the defendant's drug or medical device causes certain diseases in the human species. In two notable cases, litigation began at a time when the evidence was quite thin with regard to that causation question. In the early stages of the litigation, plaintiffs met with some success in their claims, relying on what evidence there was that the drugs or devices caused disease. However, the litigation »drove science« and additional investigation resulted in more robust evidence of causation, including a number of epidemiologic studies. In both cases, one involving a drug for morning sickness in pregnant women[385] and the other silicone gel breast implants[386], the evidence tended to exonerate the suspected agent, which eventually resulted in courts ruling as a matter of law against plaintiffs. The

383 Basic Questions I, nos 9/1–3.
384 Basic Questions I, no 8/3.
385 See *Green,* Bendectin and Birth Defects 314–316.
386 See *R.K. Craig/A. Klein/M. Green/J. Sanders,* Toxic and Environmental Torts (2011) 336–340.

point of these cases can be generalized: sometimes evidence, typically scientific evidence, with regard to a claim becomes better with the passage of time[387].

6/203 The idea that it would be unfair to impose on heirs the burden of long-unasserted claims[388] is dealt with in the U.S. by limiting claims against the decedent's estate and barring all unasserted claims once the estate is wrapped up and distributed to heirs, all unasserted claims are barred. Stale claims may not just be in the form of lawsuits but other debts or obligations of the decedent. The probate process is designed to resolve these claims in timely fashion before distribution of the remainder of the decedent's assets. A similar process exists when a corporation liquidates its assets, distributes them to shareholders, and dissolves[389].

I. Prescription periods

6/204 U.S. law is unlike Austrian law with its overarching (and lengthy) prescription period[390] and more like that described for German and Swiss law, although accrual of the claim is different in the U.S. Distinct prescription periods are specified for different types of claims, typically for negligence claims it is two years, although in different jurisdictions it may range from one to three years[391]. Generally, a claim accrues and the prescription period begins to run, as in Austria[392], upon the occurrence of the last event that would enable the victim to bring an action, which in tort cases is the occurrence of injury or harm[393]. The tortious act by the defendant must precede harm to the plaintiff, since an act cannot be a cause of harm that precedes the act.

6/205 Because in some cases, especially disease cases in which the plaintiff may not know of the harm until it clinically manifests itself or of the cause of the disease or of the defendant's role in connection with the cause of the disease, most U.S. courts or state legislatures have adopted discovery rules that delay the running of the prescription clock[394], similar to the accrual rules in Germany and Switzer-

387 See *M.D. Green,* The Paradox of Statutes of Limitations in Insidious Disease Litigation, 76 Cal. L. Rev. (1989) 965.
388 Basic Questions I, no 9/8.
389 See eg Model Business Corporation Act § 14.07 (1984).
390 Basic Questions I, nos 9/11–13.
391 Thus, in North Carolina, the statute of limitations is three years for almost all tort claims, including intentional torts. See eg North Carolina General Statutes (N.C.G.S.) § 1-52(16) (personal injury negligence actions); N.C.G.S. § 1-52(19) (assault and battery). See generally *Dobbs/Hayden/Bublick,* The Law of Torts² § 241, at 87.
392 Basic Questions I, no 9/16 f.
393 See *Dobbs/Hayden/Bublick,* The Law of Torts² § 242, at 876.
394 *Dobbs/Hayden/Bublick,* The Law of Torts² § 243, at 877–884.

land[395]. Discovery rules in the U.S. specify different matter of which the victim must have knowledge (or reasonably could have had knowledge): 1) knowledge of the existence of disease; 2) defendant's tortious conduct; and 3) the causal connection between the defendant's tortious conduct and the disease[396].

6/206 In addition to statutes of limitations, many U.S. jurisdictions employ statutes of repose for particular types of claims[397]. Statutes of repose, like the long prescription periods provided in German and Swiss law, start to run with an act other than harm to the victim, often when the defendant's tortious actions are complete. Thus statutes of repose for products liability actions provide a period of time from which the product is first sold by the defendant. Typically, the period prescribed in repose statutes is considerably shorter than the long prescription period in Austria: they tend to cluster around 8–12 years, comparable to Switzerland. Statutes of repose are quite popular for claims about negligent construction of real property. These statutes of repose can bar a tort claim before the victim is injured by the defendant's conduct and therefore before a claim has arisen upon which the plaintiff is able to sue[398].

II. Barring claims before they accrue

6/207 Although we are unfamiliar with the details of Austrian law and the claims with regard to the long prescription period barring claims before they have accrued, we find the policy analysis in Basic Questions I compelling[399]. Prescription periods that cut off claims before they accrue have been heavily criticized, the most entertaining being that of Judge *Frank* in *Dincher v. Marlin Firearms Co.*[400],

6/208 »Except in topsy-turvy land you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal ›axiom‹, that a statute of limitations does not begin to run against a cause of action before that cause of action exists, that is, before a judicial remedy is available to the plaintiff.«

395 Basic Questions I, no 9/18 f.
396 See eg *Berardi v. Johns-Manville Corp.,* 482 A.2d 1067, 1070–71 (Pa Super Ct. 1984).
397 See *Dobbs/Hayden/Bublick,* The Law of Torts² § 244, at 884–890.
398 See eg *Montgomery v. Wyeth,* 580 F.3d 455 (6th Cir. 2009).
399 Basic Questions I, nos 9/21–24.
400 198 F.2d 821, 823 (2d Cir. 1952) *(Frank, J.,* dissenting).

6/209 We can, however, explain that statutes of repose were enacted by state legislatures at the instigation of affected groups – product manufacturers, home builders, and physicians, for example – to respond to perceptions that the liability imposed on them and consequently the insurance premiums they were required to pay were excessive. Such legislation is, as Basic Questions I observes, »one-sided and thus inappropriate«[401].

401 Basic Questions I, no 9/23.

Japan

Keizô Yamamoto

Basic Questions of Tort Law from a Japanese Perspective

Chapter 7

Basic Questions of Tort Law from a Japanese Perspective

Keizô Yamamoto*

Part 1 The law of damages within the system for protection of rights and legal interests

I. Overview

The Japanese legal system provides for the protection of subjective rights, such as rights to property or personality rights. However, it is questionable what »providing for legal protection« means. This question arises in particular when a right is infringed. 7/1

A. Infringement by the person with the right

The first case to be considered is the case of someone infringing his own legal goods. In this case, the owner of the right must bear the resulting damage himself. Everyone must himself make provision for the occurrence of such damage due to his own conduct, eg by saving money or by taking out insurance, ie by distributing the risk among many people. 7/2

B. Infringement by chance (casus)

The second type of cases to be considered is those in which rights are impaired by external events, such as natural disasters. In this case too, the owner of the right 7/3

* Translated into English by *Fiona Salter Townshend* from the German translation by *Gabriele Koziol* of the Japanese manuscript.

must bear the resulting damage himself; everyone must in principle provide for such damage by savings or insurance. However, damage as a result of such events is misfortune, something which is always possible in a society. The notion of social solidarity can mean that society has the duty to help those of its members who are the victims of accidental misfortune. Various forms of social support serve this aim.

C. Infringement of a right by a third party

7/4 Thirdly, we must look at cases in which rights are infringed by another person. In this respect, two options for the protection of rights are conceivable:

1. Legal protection by punishing the perpetrator

7/5 The first is to protect rights by punishing the perpetrator. Punishing the perpetrator does not, of course, restore the victim's infringed right. However, the fact that the legal system provides for punishment of those who infringe others' rights means infringements of rights may be prevented. Japanese law recognises this deterrent function of criminal law – alongside other functions.

2. Legal protection by granting a claim

7/6 The second option consists in granting the victim a claim in order to provide for legal protection. In this respect, the type of action which brought about the infringement of the right is significant:

a. Protection against damage as a result of a lawful act – compensation

7/7 Firstly, the violation of rights may result from conduct which is allowed by the relevant legal provisions, for example, dispossession. However, even in these cases not only is the infringed right per se recognised but, beyond this, compensation of the resulting loss is required as a minimum. This notion is based on art 29 para 3 of the Japanese Constitution (JC)[1], according to which »Private property [may] be taken into use for the benefit of the general public in return for fair compensation.« According to this, a victim is entitled to seek compensation from the state for his loss.

1 *Nihon-koku kenpô* of 3.11.1946.

b. Protection against damage as a result of an unlawful act – civil law legal instruments

However, rights can also be infringed by an unlawful act of another person. In these cases, civil law instruments are used. The following categories of civil law instruments can be distinguished: **7/8**

(1) Prevention and elimination of the infringement of the right

The first group includes legal instruments that aim at eliminating the condition of the infringement of the right. The idea is to ensure that now and in the future the right is no longer infringed. Examples of these include claims that serve the protection of in rem rights, such as property, especially claims to have property returned to the owner, reparative injunctions and preventive injunctions. Under the Japanese Civil Code (CC)[2], such in rem claims are not expressly regulated but are recognised as self-evident. Whether there are also preventive injunctions in other cases is controversial; we will return to this in more detail under II. below. **7/9**

(2) Restitution of injured and usurped rights – action for unjust enrichment by interference

The second category includes legal instruments to restitute infringed and usurped rights. If a right was infringed in the past and the enjoyment of this right usurped, then these legal instruments are intended to facilitate the restitution of rights usurped in this manner or their value. The action for unjust enrichment by interference can be regarded as such a legal instrument. **7/10**

(3) Indemnification of the damage that results from an infringement of a right

The third category includes legal instruments to indemnify damage that ensues due to the infringement of a right. If in the past a right was infringed and if the victim sustained harm as a result, then as far as possible he should be restored to the state that he would have been in had this harm never occurred. Compensation claims in respect of torts are examples of such legal instruments. **7/11**

2 *Minpô,* Law no 89/1896 and no 91/1898 as amended by Law no 74/2011.

II. Reparative and preventive injunctions

7/12 There is no express regulation of the preventive injunction in the Japanese Civil Code. Thus, the question is what a preventive injunction can be based on.

A. Current status of the debate

1. Theory based on exclusive, subjective right

7/13 One view is that it is possible when an exclusive, subjective right is infringed to require that the infringement be eliminated and that the conduct causing the infringement be desisted from – in order to prevent an infringement which must be feared in the future. This would mean that, if the following exclusive rights are infringed, a claim for reparative or preventive injunctive relief must be recognised. Firstly, when there is an infringement of an in rem right, a claim for reparative and preventive injunctive relief (actio negatoria) is to be recognised as an in rem claim. Secondly, personal values, such as life, bodily integrity and also honour and the right to a private sphere are important, legally protected interests and must therefore be regarded as exclusive, subjective rights just as are in rem rights[3].

2. Theory based on tort

7/14 By comparison, it is also argued that a reparative or preventive injunction should be granted as a consequence of a tort because even when the infringed rights or legal goods are not exclusive, it is still necessary in the case of substantial, ongoing interference to protect the party affected by granting reparative or preventive injunctions, based on the tort. While it used to be argued that a claim for reparative or preventive injunctive relief must always be granted when the prerequisites of art 709 CC, specifically intention or negligence in particular, are given, nowadays such relief is only to be granted if the damage exceeds a certain level which must be tolerated as part of everyday, social life[4].

3. Theory based on wrongful infringement

7/15 Further, it is also argued that reparative or preventive injunctive relief is to be granted if legal goods worthy of protection are wrongfully infringed. This is based

3 Supreme Court of 11.6.1986, Minshû 40–4, 872.

4 *Nomura,* Kôi, kashitsu oyobi ihô-sei [Intention, negligence and wrongfulness], in: Katô (ed), Kôgai-hô no seisei to tenkai [Emergence and development of the law of environmental damage] (1968) 404 ff.

on the idea that reparative or preventive injunctions are to be granted on the basis of the overall legal system if the legal system is impaired in its functioning and its maintenance or restoration is necessary[5]. Accordingly, if an exclusive, subjective right is infringed, this is already deemed wrongful and reparative or preventive injunctions are to be granted without further ado. On the other hand, if another legal good is injured, reparative or preventive injunctive relief is to be granted if the injury to this legal good must be deemed wrongful under consideration of the conflicting interests at issue.

4. Dualistic theory

In contrast to the above views, however, it is also argued that both the theory based on exclusive, subjective right and the theories based on tort or wrongful infringement can co-exist. **7/16**

a. Theory based on exclusive, subjective rights and theory based on wrongful infringement

One view taken is that the theory based on exclusive, subjective rights and the theory based on wrongful infringement should be recognised alongside each other[6]. In the case of exclusive, subjective rights, such as in rem rights and personality rights, there should not be any weighing up of interests but instead reparative or preventive injunctive relief should always be granted when such a right is objectively infringed. As the protection thus obtained is nonetheless limited, a preventive injunction should also be granted when another legal good is infringed but depending on whether, taking account of the other conflicting interests, this infringement is to be regarded as wrongful. **7/17**

b. Theory based on exclusive, subjective rights and theory based on tort

On the other hand, it is also argued that the theory based on exclusive, subjective rights and the theory based on tort can exist alongside each other[7]. According to **7/18**

5 *Nemoto,* Sashidome seikyû-ken no riron [Theory of the preventive injunction] (2011) 349 ff, 373 ff.

6 See eg *Sawai,* Tekisutobukku jimu kanri, futô ritoku, fuhô kôi [Textbook on negotiorum gestio, unjust enrichment and tort][3] (2001) 123, 124 ff; *Shinomiya,* Jimu kanri, futô ritoku, fuhô kôi (jô) [Negotiorum gestio, unjust enrichment and tort vol 1] (1981) 470 ff; *Yoshimura,* Fuhô kôi [Unauthorised action][4] (2010) 122 ff, as well as in a similar vein *Hirai,* Saiken kakuron II Fuhô kôi [Law of obligations Particular part II Tort] (1992) 107 ff.

7 *Ôtsuka,* Seikatsu bôgai no sashidome ni kansuru kisoteki kôsatsu (8) [Fundamental considerations regarding preventive injunctions in the case of *nuisance* (8)], Hôgaku Kyôkai Zasshi 107–4

this view, reparative or preventive relief is to be granted in principle when an exclusive, subjective right is infringed. When, however, an interest that does not enjoy the same protection as an exclusive right is infringed, reparative or preventive injunctive relief should still be granted if there has been a tort insofar as there is fault or breach of a duty in relation to conduct by the injuring party.

5. Problems associated with the views presented thus far

7/19 As has been shown, opinions regarding the bases of reparative and injunctive relief vary widely. However, each of them poses particular problems.

a. Problem of the theory based on exclusive, subjective rights

7/20 Firstly, as far as the theory based on exclusive, subjective rights is concerned, the conclusion that reparative or injunctive relief must be granted precisely because an exclusive, subjective right is at issue is pure tautology. It is not possible to determine in the abstract whether a right is exclusive or not, as this is inextricably connected with the question of whether the protection of this right is recognised as including elimination of impairments and protection against such or not. Therefore, the crux of the issue is whether there is any reason to grant this right such extensive protection.

b. Problem of the theory based on tort

7/21 The difficulty with the theory based on tort is that it is not clear why reparative or preventive relief should be granted when there has been a tort. Art 709 CC provides for compensation claims as the only legal consequence, therefore a special justification is necessary in order to award reparative or preventive injunctive relief.

c. Problem with the theory based on wrongful infringement

7/22 In the case of the theory based on wrongful infringement, on the other hand, the way the wrongfulness is deduced from the rules and principles of the legal system is problematic. Even when the infringement of an exclusive, subjective right is deemed wrongful per se and reparative or preventive relief is granted directly on

(1990) 1 ff; *idem,* Jinkaku-ken ni motozuku sashidome seikyû [Preventive injunction on the basis of personality rights], Minshô-hô Zasshi 116–4/5 (1997) 1 ff; *idem,* Kankô soshô to sashidome no hôri [Environmental law proceedings and the preventive injunction principle of law], in: Hirai Yoshio sensei koki kinen [Commemorative publication for the 70th birthday of Yoshio Hirai] (2007) 701.

this basis, there is still no answer as to why this right must be protected so extensively and on what foundation this is provided for in the legal system. Further, in the event that other legal interests are infringed, it is unclear how the countervailing interests must be weighed up and how to assess whether the infringement of the interest was wrongful or not.

d. Problems associated with the dualistic theory

The dualistic theory cannot solve the above-mentioned problems either. 7/23

B. Theory based on the duty to protect fundamental rights

In a departure from the above-described views, it is argued that even when there is no express rule, injunctive relief can be based on the duty of the state to protect fundamental rights[8]. 7/24

1. Justification of claims for reparative and preventive injunctive relief

The following arguments can, therefore, be made in favour of granting a claim for reparative or preventive injunctive relief: 7/25

a. State duty to protect fundamental rights

The premise taken is that the state has a duty to protect the fundamental rights of the individual against interferences by another. If one was to assume that it was admissible for the state to watch passively even when someone's fundamental rights were infringed by another, eg by murder, theft, rape or arson, the state would lose its very purpose. Further, modern states prohibit self-help as it were in principle, so that individuals are defenceless against interference by others. Therefore, it must be a matter of course that the state is obliged to protect the fundamental rights of each individual against interference by others[9]. 7/26

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8 *Yamamoto,* Hanrei hihyô: Saihan shôwa 61-nen 6-gatsu 11-nichi [Comment on the decision of the Supreme Court of 11.6.1986], in: Nakata et al (ed), Minpô hanrei hyakusen I [100 selected decisions on civil law I][6] (2009) 10 f.

9 *Yamamoto,* Gendai shakai ni okeru riberarizumu to shiteki jichi (1) [Liberalism and private autonomy in today's society (1)], Hôgaku Ronsô 133–4 (1993) 16 ff. This is based on the development of German case law and theory. See on this in particular *Canaris,* Grundrechte und Privatrecht, AcP 184 (1984) 201, 225 ff; *idem,* Grundrechte und Privatrecht – eine Zwischenbilanz (1999) 37 ff, 71 ff.

b. Duty of the courts to develop the law

7/27 If no effective protection of those whose fundamental rights have been infringed can be obtained under the protective mechanisms already provided for by the legislator (compensation on the basis of art 709 CC), then the courts, which are also organs of the state, have a duty to fill the gaps in the legislation and at least to grant a minimum standard of protection. Thus, if sufficient protection of fundamental rights cannot be attained without granting reparative or preventive injunctive relief, the courts have a duty under the Constitution to grant such injunctive relief even in the absence of an explicit rule.

2. Prerequisites for the protection of rights

7/28 Accordingly, it is a prerequisite that fundamental rights have been infringed or that there is concern that such will be infringed. In this respect fundamental rights are understood as not only including exclusive rights, ie in rem rights, rights of control over assets or bodily integrity rights (bodily personality rights).

3. Justification for limiting the rights of the perpetrator

7/29 If reparative or preventive relief is granted in the manners described above to a victim, this necessarily leads to a limitation on the rights of the perpetrator. As the perpetrator also has (fundamental) rights, the state may not limit these excessively. As the rights of the perpetrator collide with those of the victim, it is necessary to weigh up the different rights in advance, as is explained in the following[10].

7/30 Firstly, the more the rights of the perpetrator would be limited by rewarding the victim reparative or preventive injunctive relief, the more substantial a justification is required for such interference. The greater the necessity to protect the rights of the victim, the more likely there is such justification. In this respect, the two following elements play a role when it comes to weighing up the interests:

7/31 On the one hand, the ranking of the infringed right is material. Real property rights or personality rights must certainly be deemed to rank highly, so that it is easier to justify reparative or preventive injunctive relief.

7/32 On the other hand, the gravity of the infringement also plays a role. For example, even when an in rem or a personality right is infringed, it is not necessary to grant reparative or preventive injunctive relief if the infringement is only minimal. In the case of other rights, such injunctive relief ought only to be granted if the in-

10 In this context the principle of proportionality applies in the narrower sense. This corresponds to the comparative principles in the flexible system. Cf *Otte,* Zur Anwendung komparativer Sätze im Recht, in: F. Bydlinski et al (eds), Das bewegliche System im geltenden und künftigen Recht (1986) 271 f.

fringement is substantial and there are no other effective means available to remedy it other than reparative or preventive injunctive relief.

III. Disgorgement of profit

A. The problem issue

If someone obtains a benefit from using the legal goods of another without this party's agreement, the question arises as to whether the owner of the right may demand the disgorgement of the benefit so obtained. It is a matter of debate in Japan whether such a claim for disgorgement of profit is to be awarded or not. **7/33**

1. Limits of the protection against legal infringements

Using the legal good of another person without the latter's consent is deemed to be an infringement of a right. However, it is difficult to justify a claim for disgorgement of the benefit thus obtained on the basis of the legal instruments available under the applicable law in the case of infringement of a right. **7/34**

The law of tort is aimed at compensating the damage that is sustained by the owner of the right. The profit obtained by the unauthorised user can, however, not really be seen as damage. **7/35**

The law on unjust enrichment, on the other hand, is aimed at the restitution of a usurped benefit to which the owner of the right is entitled. However, the benefit obtained by the unauthorised user can hardly be deemed to be the loss of the owner of the right, which would be the basis for such a claim according to the traditional view. **7/36**

2. Problem issue

The action by which a third party's legal good was put to unauthorised use and a benefit thus obtained can be looked at from two different angles. Depending on which of these is emphasised, two different perspectives are possible. **7/37**

a. Obtaining a benefit by unauthorised use of a third party's legal good

One view is that the party who made the unauthorised use obtains his benefit precisely from interfering in a third party's right. This in turn has twofold significance. **7/38**

7/39 Firstly, the benefit obtained by the unauthorised use is a benefit that in fact may only be drawn by the person who owns the right. Therefore, the benefit must be allocated to the owner of the right, while the party who made the unauthorised use may not retain it.

7/40 Secondly, the benefit obtained by the party who made the unauthorised use is a benefit that was obtained by unlawfully using a right that he was not allowed to use. Therefore, such party should not be allowed to keep this benefit.

b. Obtaining a benefit by one's own ability and work

7/41 The other view emphasises that the benefit obtained in an unjustified manner is the result of the ability and work of the party who made the unauthorised use. If the entire benefit is withdrawn from such, this means that the owner of the right acquires a benefit without having worked for it.

B. The status of the debate in civil law

1. View rejecting the surrender of the benefit

7/42 Some argue that, according to applicable civil law, no claim for surrender of the *entire* benefit obtained by the party making unauthorised use can be granted to the owner of the right[11]. A claim for surrender can only be granted insofar as this relates to a loss suffered by the owner of the right, ie insofar as the return of an unjust enrichment or the compensation of the damage can be traced back to a tort.

7/43 In this respect it is not necessary to prove a specific loss in the individual case, rather it is sufficient when the unauthorised use generally effects a corresponding enrichment and thus, it may be assumed that the owner of the right has suffered a corresponding loss. If the party that made the unauthorised use exploited his own special ability or a special opportunity and thus gained an enrichment that exceeded what is usually foreseeable, this does not represent any loss for the owner of the right and any claim for surrender is not to be awarded to this extent.

2. View supporting the claim for surrender

7/44 Contrariwise, others argue that in such cases the owner of the right has a claim to surrender of the benefit which should be granted. The justification for this is controversial, however:

11 *Wagatsuma,* Saiken kakuron gekan [Law of obligations Particular part II] (1972) 927 ff; *Matsuzaka,* Jimu kanri, futô ritoku [Negotiorum gestio, unjust enrichment]² (1973) 49.

a. Imputation of the benefit to the owner of the right – quasi negotiorum gestio

According to another view, a claim for surrender must be granted to the owner of the right on the basis of the concept that the benefit which the party that made the unauthorised use obtained is actually imputable to the owner of the right. The argument is that administering someone else's affairs for one's own purposes is similar to negotiorum gestio and thus, the relevant rules should be applied analogously[12]. 7/45

(1) Effects of quasi negotiorum gestio

According to this, the party making the unjust use must surrender everything that he obtained from administering the other person's affairs (art 701 CC by analogy)[13]. The owner of the right, on the other hand, must to the extent that he obtains a benefit, indemnify the party that made the unauthorised use for useful costs in this respect (art 702 CC by analogy). 7/46

(2) Criticism

This categorisation as quasi negotiorum gestio is criticised, however, on the basis that negotiorum gestio actually requires that the conduct is altruistic and it would be contrary to the essence of the concept to equate administering another's affairs for one's own use to an altruistic action. 7/47

b. Sanctioning the unauthorised use

A further line of opinion considers that the owner of the right's claim to surrender of the benefit should be recognised because it ought not to be allowed that someone who makes unauthorised use of the legal goods of another be permitted to keep the resulting benefit[14]. 7/48

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12 See eg *Hatoyama,* Nihon saiken-hô kakuron (ge) [Japanese law of obligations Particular part (2)] (expanded version 1927) 777 ff; *Suekawa,* Jun-jimu kanri [Quasi-negotiorum gestio], in: idem, Saiken [Law of obligations] (1936) 482. This was argued with reference to § 687 para 1 of the German Civil Code (BGB) as well as the existing discussion in this respect in German legal circles.

13 Imperial Court of 19.12.1918, Minroku 24, 2367.

14 *Yoshimi,* Jun-jimu kanri no sai-hyôka – futô ritoku-hô tô no kentô o tsûjite [Reevaluation of quasi negotiorum gestio – on the basis of the investigation of the law on unjust enrichment inter alia], in: Taniguchi Tomohei kyôju kanreki kinen (3) [Commemorative publication for Tomohei Taniguchi on his 60th birthday (3)] (1972) 425 ff; *Hironaka,* Saiken kakuron kôgi [Textbook on the law of obligations Particular part][6] (1994) 388 ff; *Shinomiya,* Jimu kanri, futô ritoku, fuhô kôi (jô) [Negotiorum gestio, unjust enrichment and tort vol 1] 43 ff; *Sawai,* Tekisutobukku jimu kanri, futô ritoku, fuhô kôi [Textbook on negotiorum gestio, unjust enrichment and tort][3] 22; *Fujïwara,* Futô ritoku [Unjust enrichment] (2002) 272.

(1) Justification

7/49 It would further be an injustice if a benefit was allocated to the party that obtained it due to an intentional and unlawful action – albeit also by means of his ability and work. Therefore, the disgorgement of the benefit obtained from the unauthorised use is to be stipulated as a sanction against the party that carried out the wrongful action.

(2) Criticism

7/50 However, there is criticism that such an emphasis on the penalising function is not reconcilable with the basic principles of the Civil Code.

C. Solution de lege ferenda

7/51 Since, as described above, it is difficult under applicable law to recognise any claim of the owner of the right to surrender of the benefit, a solution de lege ferenda is desirable. In respect of the unauthorised use of intellectual property, for example, special laws have established a rule according to which it is presumed that the owner of the right has suffered damage to the same degree that the injuring party obtained a benefit (cf, eg, art 102 Patent Act, art 29 Utility Model Act, art 39 Design Act, art 28 Trademark Act, art 25 Act on the Circuit Layout of a Semiconductor Integrated Circuits, art 114 Copy Right Act and art 5 of the Unfair Competition Prevention Act).

IV. Other legal instruments available to the victim

A. Limits of the law of damages

7/52 With a focus on which protection is available to the victim, the law of damages has the following limitations:

1. Limits due to the necessary prerequisites

7/53 As the law of damages imposes liability upon the injuring party, it is necessary to take the rights of the injuring party into account too, which is why there must be certain prerequisites – the minimum requirement being that the injuring party infringed the rights of the victim – in order to justify imposing liability upon the injuring party.

2. Limits due to the financial means of the injuring party

As the law of damages imposes liability upon the injuring party, there will ultimately be no compensation of the damage if the injuring party does not dispose of sufficient means. **7/54**

3. Limits due to the legal proceeding

As, thirdly, the law of damages provides for liability to be enforced by means of a court proceeding, there is also the problem of the ensuing expenses of time and money. **7/55**

B. Institutions that complement the law of damages – third party liability insurance

There is liability insurance that builds on the law of damages, ie it requires that the injuring party be liable for infringing a right, and serves to safeguard the enforceability of such liability. **7/56**

1. Significance

Liability insurance means that, when the injuring party has a duty to compensate, the insurer must pay out the insurance sum on the basis of this insurance event. The prerequisite for this is that the injuring party took out insurance cover beforehand and paid the insurance premiums. **7/57**

2. Function

Liability insurance fulfils two functions: firstly, it facilitates the enforceability of the victim's claims in that it ensures that the injuring party has sufficient financial means. Secondly, it serves to distribute the burden resulting from having to compensate among several possible injuring parties. **7/58**

C. Institutions independent of the law of damages

Insofar as a tort is required as a basis, there are firstly limitations due to the respective prerequisites of the legal instruments, secondly these are ultimately subject to a court decision; therefore, the question arises whether simpler and faster relief is available. For this reason, the following institutions, which do not require any tort, also exist. **7/59**

1. Relief provided by the community of potential causers – accident insurance

7/60 Firstly, there is accident insurance where a group of parties who may cause damage collect money and a certain payment is made to the victim regardless of whether there is a tort.

a. Specific examples

7/61 On the basis of the Workmen's Accident Compensation Law[15] of 1947, compensation is paid out in the case of work accidents. The Pollution-Related Health Damage Compensation Law[16] of 1973 regulates compensation when health is impaired due to environmental problems. Further, the Act on Assistance in the case of Drug Side-Effects Injuries Relief and Research Promotion Fund Act[17], now the Act concerning the self-governing body »Pharmaceuticals and Medical Devices Agency« (2002), provides for help in the case of damage from the side-effects of a medicine.

b. Special features

7/62 The various insurance systems have the following special features:

7/63 Firstly, the payments are financed wholly or in part by contributions from the group of potential causers (eg, employers, those who emit pollutants or pharmaceutical enterprises).

7/64 Secondly, the payments are calculated on the basis of certain formalised standards. Therefore, the actual damage will not necessarily be compensated.

2. Help from the state – social insurance

7/65 Further, there is the social security system that provides help from the state to the party who has suffered an accident, regardless of whether there was a tort.

a. Compensation for victims of crimes

7/66 There is a compensation scheme for victims of crime, for example, on the basis of the Law of 1980 on the payment of benefits to victims of crime[18]. The beneficiaries of this scheme are those who are bereaved after someone is killed in a crime as

15 *Rôdô-sha saigai hoshô hoken-hô,* Act no 50/1947 as amended by Act no 63/2012.

16 *Kôgai kenkô higai no hoshô-tô ni kansuru hôritsu,* Act no 111/1973 as amended by Act no 44/2013.

17 *Iyaku-hin fuku-sayô higai kyûsai, kenkyû shinkô chôsa kikô-hô,* Act no 55/1979 (rescinded by Act no 192/2002).

18 *Hanzai higai-sha tô kyûfu-kin no shikyû-tô ni yoru hanzai higai-sha tô no shien ni kansuru hôritsu,* Act no 36/1980 as amended by Act no 15/2008.

well as victims who have suffered serious disability due to a crime. The payment is calculated on the basis of certain formalised standards. Therefore, the actual damage sustained will not necessarily be compensated.

b. Social assistance

Further, there is the possibility that a victim who has fallen on hard times may receive support for medical treatment and welfare assistance on the basis of the Livelihood Assistance Law[19] of 1950. **7/67**

19 *Seikatsu hogo-hô,* Act no 144/1950 as amended by Act no 72/2012.

Part 2 The tasks of tort law

I. Compensation of the damage

7/68 Within the law of damages, one question is how the goal of protecting the rights of the victim, on the one hand, and the aim of not excessively limiting the rights of the injuring party on the other, can be reconciled.

A. Compensation of the damage – protection of the victim's rights

7/69 Firstly, granting a claim for compensation of damage that has arisen as a result of interference by another party is the necessary minimum standard of protection for legal goods. On the other hand, any compensation that exceeds the compensation of the damage sustained is no longer in harmony with the notion of protection of rights.

B. Limitation of the injuring party's rights by the protection of the victim – observing the injuring party's rights

7/70 Secondly, the protection afforded to the victim may not excessively limit the rights of the injuring party. Therefore, the question of to what extent the limitation of the injuring party's rights in order to protect the victim's rights is justified arises.

II. Deterrence and penal function

7/71 Both criminal and administrative law penalties are available as a means to deter people from committing unlawful actions and to punish perpetrators. It is questionable whether the law of torts, which in contrast to criminal and administrative law is a civil law area, can also be seen as a means to realise the above-mentioned purposes.

A. Actual functions

It is generally accepted that in practice the law of torts also serves to deter perpetrators and/or to penalise their conduct together with criminal law and the administrative law rules. 7/72

1. Deterrent function

Firstly, there is the possibility that the law of torts creates an incentive for potential injuring parties to act with care and to desist from dangerous acts in order to avoid creating duties to compensate. 7/73

2. Penalising function

Further, the fact that liability is imposed upon the injuring party may satisfy any desires on the part of the victim or society to exact revenge and to penalise the injuring party. 7/74

B. Deterrence and/or penalising function

The question arises whether, for the purpose of deterring the injuring party and/or penalising him, it should be possible to award compensation that goes beyond the indemnification of the damage sustained (punitive damages) or to award double or triple times the worth of the damage sustained (multiple damages). 7/75

1. Affirmation of the deterrence and penalising function

Such a payment exceeding the damage actually suffered for the purposes of deterrence or punishment is advocated by some[20], on the basis of the following considerations: 7/76

Firstly, there is no unambiguous boundary between civil law on the one side and criminal and administrative law, on the other; rather this boundary runs differently in different states and also changes over the course of time. In any case, it is too sweeping a statement to say that deterrence and punishment ought to be completely excluded from the civil law rules as this would represent too categorical a distinction between civil law and criminal and administrative law. 7/77

20 *Tanaka/Takeuchi,* Hô no jitsugen ni okeru shijin no yakuwari [The role of the individual in the realisation of law] (1987) 156 ff.

7/78 Furthermore, if one approaches the question from a functional perspective, namely how one can better enforce compliance with the law, one would have to support imposing penalties if this deters potential perpetrators from committing damaging acts and a more effective enforcement of the law can be achieved.

7/79 Finally, in more recent times it has been argued against the background of the economic analysis of law that the notion of compensating the victim's damage is not explained rationally in many instances by the applicable law of torts and thus, the main purpose of the law of torts is instead to be seen in the optimal prevention of unlawful acts[21].

2. Rejection of the deterrence and penalising function

7/80 In contrast to the above-described view, however, in Japan the prevailing opinion is that no damages exceeding the compensation of the actual damage are to be awarded[22]. This is justified as follows:

7/81 Firstly, the Japanese Civil Code only provides for a duty to compensate in accordance with damage sustained, as is shown in the wording of art 709 CC, pursuant to which the injuring party is obliged »to compensate any damage resulting in consequence«. Further, the victim's rights are protected by the compensation of the actual damage; there is no justified interest in obtaining compensation going beyond this. Any and all payments exceeding the compensation of damage cannot be justified simply by the fact that this would serve to penalise or deter damaging acts. The injuring party also has rights, and limiting these excessively is not admissible.

21 *Morita/Kozuka,* Fuhô kôi-hô no mokuteki [Aims of the law of torts], NBL 874 (2008) 10.

22 Supreme Court of 11.7.1997, Minshû 51–6, 2573. See further *Shinomiya,* Fuhô kôi [Tort] (1987) 267; *Sawai,* Tekisutobukku jimu kanri, futô ritoku, fuhô kôi [Textbook on negotiorum gestio, unjust enrichment and tort][3] 85 ff; *Shiomi,* Fuhô kôi-hô I [The law of torts I][2] (2009) 50 ff (which, however, wants to recognise a function of penance and/or satisfaction). On the other hand, *Kubota,* Fuhô kôi to seisai [Tort and sanction], in: Ishida Kikuo sensei koreki kinen [Commemorative publication for Kikuo Ishida on this 70th birthday] (2000) 667; *idem,* Songai baishô [Damages], Jurisuto 1228 (2002) 62, proceeds on the basis that the law of torts has a penalising function and advocates realising this purpose in Japanese law via the assessment of damage.

Part 3 Structure of the law of torts

I. Overview of the system of delict law in Japan

First, there will be an overview of the structure of delict law in Japan. 7/82

A. General rule

1. Prerequisites for liability

a. Basic prerequisites

The Japanese Civil Code sets out the basic prerequisites for delictual liability in art709: »A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damage resulting in consequence«. 7/83

Therefore, like French law but unlike German law, Japanese law has a uniform rule on delictual liability. While French law requires that »damage« has occurred, Japanese law requires the infringement of a »right of others, or legally protected interest of others«. Unlike under § 823 para 1 of the German Civil Code (BGB), rights or legally protected interests in the sense of art 709 CC are not limited to absolute rights. 7/84

b. Exclusion of liability – grounds for exoneration

The Japanese Civil Code sets out the following grounds on which delictual liability is denied despite fulfillment of the above-named basic prerequisites: 7/85

(1) Lack of capacity for fault

The first case is when there is lack of capacity for fault. There are specific rules in this respect for two different cases. According to art 712 CC, there is no liability when a minor does not possess the necessary powers of discernment to recognise that he could be accountable for his actions. Art 713 CC excludes liability when someone, due to a mental disability, is not in a state to have the capacity to recognise that his actions could make him accountable. Insofar, the subjective abilities of the specific perpetrator to recognise the legal responsibility ensuing from his actions are taken as the basis; however, liability does not depend on his ability to act in accordance with such insight. 7/86

(2) Self-defence and necessity

7/87 Furthermore, self-defence and necessity exclude liability (art 720 CC).

2. Legal consequences

a. Damages

7/88 The Japanese Civil Code provides for damages as the legal consequence of tort.

(1) Entitlement to claim

7/89 There are two special rules in relation to who is entitled to assert a claim for damages. The first is art 721 CC, according to which an unborn child is deemed already to have been born in respect of the right to seek compensation. Moreover, according to the second special rule in art 711 CC, certain close relatives can also seek damages for pain and suffering when the victim dies.

(2) Contents of compensation

7/90 With respect to the content of the compensation, the following rules exist:

(i) Type of compensation

7/91 Compensation shall be made in money (art 722 para 1 in combination with art 417 CC).

(ii) Damage

7/92 The general rule in art 709 CC merely provides that the object of the compensation is »damage«. Art 710 CC, however, also provides expressly for the compensation of non-pecuniary damage.

(iii) Extent and assessment of the compensation

7/93 With respect to the extent and assessment of the compensation, the general rule in art 709 CC merely provides that »any damage resulting in consequence« must be compensated. Art 722 para 2 CC, however, provides for a reduction of compensation when the victim acted negligently (contributory fault).

(3) Prescripton

7/94 Compensation claims are barred three years after knowledge of the damage and the identity of the injuring party or at the latest 20 years after the point in time of the tort (art 724 CC).

b. Further legal instruments

Besides monetary damages, art 723 CC provides by way of exception for restitution in kind in the case of injuries to the reputation of a person, namely by restoring his reputation. **7/95**

B. Special rules

Further, the Japanese Civil Code provides for special rules that supplement the basic rule in art 709 with respect to special situations. **7/96**

1. Tort with the involvement of several parties

Firstly, there are rules on the involvement of several people in a tort. Within this context, two cases must be distinguished: **7/97**

a. Liability due to the action of another

Firstly, there is the case that someone other than the direct injuring party is liable to pay compensation. **7/98**

(1) Civil Code

The Civil Code provides for three forms of this type of liability. Firstly, under art 714 CC it is possible for those with a duty to supervise to be held liable when someone who is not capable of fault inflicts damage. Secondly, under art 715 CC a principal can be held liable for the damaging conduct of employees. Thirdly, under art 716 CC, someone who has commissioned work can be held liable for the damaging conduct of the works contractor. **7/99**

(2) Special laws

Furthermore, the following two types of liability are regulated in special laws: according to art 1 of the State Redress Act[23], the state or public entity is liable for damage that a public official inflicts wrongfully and intentionally or negligently upon another in exercising the public power of the state or public entity in carrying out his duties (public liability). **7/100**

Secondly, whoever places a car at another's use for their own benefit is liable to compensate the damage that the other sustains to his life or body due to operating the car (liability of the keeper of the motor vehicle, art 3 Law on securing compensation for damage caused by automobiles)[24]. **7/101**

23 *Kokka baishô-hô,* Law no 125/1947.

24 *Jidô-sha songai baisho hoshô-hô,* Law no 97/1955 as amended by Law no 53/2013.

b. Liability of several injuring parties

7/102 On the other hand, it is conceivable that several actors are liable under the law of delict. Art 719 CC stipulates that when several commit a tort together, these joint perpetrators are jointly and severally liable to pay compensation.

2. Damage by a thing

7/103 Further, there are provisions for when damage ensues from a thing.

a. Civil Code

7/104 The Civil Code provides for liability in the following two cases.

7/105 Firstly, under art 717 CC the possessor or owner of a building is liable when damage is sustained by another party due to the defective construction or maintenance of a building.

7/106 Secondly, art 718 CC provides for the liability of the possessor or custodian of an animal if the animal inflicts damage upon someone else (liability of keepers of animals).

b. Special laws

7/107 In the field of special statutory rules, the following two types of liability are especially important. Firstly, the state or public entity is liable for damage that arises to another due to defectiveness in the construction or maintenance of roads, rivers, or other public constructions (art 2 State Redress Act). Secondly, the producer is liable for damage if another is injured in his life, body or property due to a defect in a product (art 3 Product Liability Act)[25].

II. Prerequisites for general liability to pay compensation: infringement of a right, wrongfulness and fault

7/108 Since the Civil Code came into force there has been intense debate on the general prerequisites for liability to pay compensation, in particular about the infringement of a »right« and »fault«; opinions diverge in a fundamental manner. As this

25 *Seizô-butsu sekinin-hô,* Law no 85/1994.

is important with respect to understanding Japanese tort law, the development of the debate is outlined below[26].

A. Starting point

1. The rule in art 709 CC

The original version of art 709 CC when the Civil Code came into force was: »A person who has intentionally or negligently infringed the right of another shall be liable to compensate any damage resulting in consequence«. The following prerequisites for liability can be inferred from this: firstly, a subjective right of another person has been infringed; secondly, the injuring party acted intentionally or negligently; and thirdly the right is infringed due to the intentional or negligent act of the injuring party, ie there is a causal relationship between the injuring party's act and the infringement of the victim's subjective right. **7/109**

2. The interpretation of the authors of the Civil Code

According to the authors of the Civil Code, the prerequisites under art 709 CC must be understood as follows[27]. **7/110**

a. Significance of the infringement of the right as a prerequisite for liability

While the so-called old Civil Code – which was drafted before the currently valid Civil Code by the French lawyer *Gustave E. Boissonade,* but never came into force – required like the French Code civil that someone inflict damage upon another[28], the valid Civil Code requires the infringement of a right. This is based on the concept that the field of delictual liability would be over-extended and thus its scope unclear if it was sufficient on its own that *damage* had been inflicted, thus also including damage that was not brought about by the infringement of a right. **7/111**

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26 Cf *Yamamoto,* Fuhô kôi hôgaku no sai-kentô to aratana tenkai – kenri-ron no shiten kara [Rethinking the law of delict dogmatic and new prospects for development – from the perspective of the rights theory], Hôgaku Ronsô 154–4/5/6 (2004) 292.

27 On the history of the drafting of art 709 ZG see *Segawa,* Minpô 709-jô (fuhô kôi no ippan seiritsu yôken) [Art 709 ZG (general prerequisites for delictual liability)], in: Hironaka/Hoshino (eds), Minpô-ten no hyakunen III [100 Years of the Civil Code III] (1998) 559.

28 Art 370 para 1 of the old CC was phrased as follows, drawing on the French formulation, which was based on *faute* and *négligence:* »Whoever has inflicted damage on another by negligence or fault is liable to compensate such«.

7/112 The concept of »right« in this respect was understood very broadly and included both pecuniary rights including rights to claim, as well as personal interests, such as life or honour and reputation.

b. Significance of fault as a prerequisite for liability

7/113 Further, the Civil Code takes the principle of fault as a basis and requires that there be intention or negligence. This takes account of the idea that it would be unclear how far the liberty of the indivdual was to reach if he was obliged to pay compensation even when he had acted duly and properly and exercised sufficient care.

7/114 During the work on the Civil Code, however, it emerged that there were two different views of fault. On the one hand, fault was understood as »not doing what one ought to do« and/or »doing something that one ought not to do«, thus in other words as an infringement of objective duties. On the other hand, fault was also seen as a question of the mental state of the injuring party, ie as a subjective, psychological condition of the actor.

B. The emergence of the traditional view

7/115 The above described view of two liability prerequisites, namely infringement of a right and intention or negligence, was later comprehensively revised. The prerequisite of infringement of a right was revised first.

1. Turning point in the case law

a. Case law in the beginning

7/116 In the beginning case law interpreted the expression »right« very narrowly and only imposed liability for compensation if a right, that was already recognised in the legal system, was infringed[29].

b. Change in the case law

7/117 As time went on, however, the number of social interests to be protected by the law of damages grew – in line with changes in societal conditions. Therefore, case law took a different course in order to adapt to the new situation. Firstly, it was deemed to be sufficient when a »legally protected interest« was infringed[30]. Later,

29 Imperial Court of 4.7.1914, Keiroku 20, 1360 (Tôchûken Kumoemon case).
30 Imperial Court of 28.11.1925, Minshû 4, 670 (Daigaku-yû case).

the unlawful act amounting to the tort was understood as an »act which is contrary to a statutory requirement or prohibition« and the prerequisite that there be an infringement of a *right* was reinterpreted as a prerequisite that someone injured another *by means of an unlawful act.*

2. The development of the prevailing doctrine – from infringement of a right to wrongfulness

a. The emergence of the doctrine of wrongfulness

In line with the change in the case law, legal theory also argued that the prerequisite for delictual liability was not the infringement of a right but wrongfulness[31]. This was reasoned as follows. **7/118**

(1) Understanding of the legal system

This new doctrine was based on the following understanding of the legal system: the legal system was seen as consisting of the individual positive legal rules, in particular statutory law and customary law, together. This view distinguished between laws requiring something and laws allowing something. Laws that require something are rules that make an act or omission obligatory, while laws that allow something do not simply issue requirements or prohibitions but stipulate positively that a certain act is admissible. It considered that these express legal norms also left gaps, which were to be filled in harmony with ordre public as the system of fundamental principles behind the overall legal system. **7/119**

(2) Significance of the infringement of a right

On the basis of the developments described above, subjective rights were understood as a specification of the legal system (the laws allowing something). Hence, infringement of a right is to be automatically deemed wrongful as it is a breach of the legal system as such. **7/120**

(3) From infringement of a right to wrongfulness

Since – as just explained – an infringement of a right is per se generally to be regarded as wrongful, the prerequisite for liability consisting in infringement of a right as stipulated in the Civil Code must, the theory argues, be understood as meaning that the act by which damage is inflicted upon the other person must be wrongful. According to this view, »infringement of a right« is only an expression for an action which is not accepted legally, ie for an action that must be evaluated as wrongful since it offends the legal system. **7/121**

31 *Suekawa,* Kenri shingai-ron [Doctrine of infringement of a right] (1949, first edition 1930).

7/122 Therefore, liability should also be recognised, so the argument, even when there is no infringement of a right but the injuring party's action is otherwise to be deemed wrongful. Thus, when there is wrongfulness in the form of an infringement of a statutory requirement or prohibition or a breach of ordre public, then liability for compensation is to be recognised even when no infringement of a right can be assumed.

b. Evaluation of wrongfulness

7/123 As time went on, the view that saw wrongfulness as the prerequisite for liability prevailed. It also contends that the degree of wrongfulness based on the injured interests and the degree of wrongfulness with respect to how the interfering act was carried out must both be comprehensively evaluated and the relationship between them also considered in order to establish wrongfulness[32].

(1) Degree of wrongfulness based on the injured interests

7/124 As far as the injured interests are concerned, there are gradual declinations between clearly defined rights and those rights that are still at a stage of development. There is greater wrongfulness in the case of a strong right being infringed as compared to a more weakly developed right.

(i) Rights to control things in relation to one's assets

7/125 Since the direct control over a thing is protected in relation to everyone else in the case of in rem rights as absolute rights, an infringement of these rights is wrongful to a very high degree. The infringement of copyright, patent rights, rights to utility models and designs or trademarks, which are likewise protected against everyone else, is also highly wrongful.

(ii) Claims and rights to trade

7/126 In the case of claims, on the other hand, which by contrast have no exclusive effect, any infringement is only wrongful by virtue of the type and nature of the act, eg by the use of unfair means. Insofar as there is interference with the established and operating business enterprise, wrongfulness is determined on the basis of the type and nature of the interference. Although the business enterprise has an independent pecuniary value, there is nonetheless not such a clearly defined right as property, so that the type and nature of the interference is material.

32 Cf *Wagatsuma,* Jimu kanri, futô ritoku, fuhô kôi [Negotiorum gestio, unjust enrichment and tort] (1937) 100 f, 125 f; *Katô,* Fuhô kôi [Tort] (1974) 35 ff, 106 ff.

(iii) Personality rights

aa. Life and bodily integrity

Injury to life and bodily integrity is, of course, wrongful. **7/127**

bb. Freedom and reputation

By contrast, interference with liberty is not automatically wrongful; it depends on the act causing the infringement. Therefore, it is not necessary to take the infringement of the right to liberty as a basis; it is sufficient when wrongfulness can be established given the type and nature of the interfering action. The injury to reputation must be treated in exactly the same fashion; accordingly, wrongfulnesss must be evaluated on the basis of the type and nature of the interfering action. **7/128**

cc. Right to one's name, image and reputation

The rights to one's name, image and with respect to one's reputation, etc are legally recognised but are not absolute rights. Therefore, wrongfulness depends on the type and nature of the interfering action; there is only wrongfulness if a law or ordre public is breached. **7/129**

(2) Degree of wrongfulness with respect to the type and nature of the infringing action

In the area between exercising a right and a breach of the law, the degree of wrongfulness increases gradually with respect to the type and nature of the infringing action. If damage is inflicted on a third party by an action that constitutes a criminal act, this damaging action is very clearly wrongful. If there is a breach of an administrative law prohibition, there is only wrongfulness in the sense of the law of delicts if the purpose of the administrative law prohibition lies in the protection of individual interests. If the administrative law prohibition aims at the protection of individual interests and if the breach of this law results in damage to the person who it aims to protect, then there is wrongfulness. Further, wrongfulness is also to be assumed if there is no direct breach of a particular law but instead against the ordre public or »public morals«. As far the exercise of a right is concerned, exercising it within a reasonable extent is not wrongful but, when the right is abused, this is wrongful. **7/130**

(3) Evaluation of the degrees of wrongfulness in relation to each other

The evaluation of the degree of wrongfulness based on the infringed interests and the degree of wrongfulness with respect to the type and nature of the interfering action in relation to each other must be carried out according to the follow- **7/131**

ing guidelines[33]. Wrongfulness is greatest when an absolute right is infringed by an unlawful action. By contrast, wrongfulness is weakest when a right that is still emerging within social conditions is infringed by the exercise of another right. In turn, if there is infringement of a right with only weak absolute effect or which is unclear in terms of content, wrongfulness must be determined on the basis of the type and nature of the infringing action.

3. The concept of fault

7/132 The prerequisites for fault were understood as follows according to the earlier prevailing theory[34].

a. Subjective aspect of the concept of fault

7/133 Negligence was understood as lack of care, requiring that the perpetrator is mentally capable of foreseeing the result of an action. This means that fault was seen as a subjective prerequisite for liability.

b. Objective aspect of the concept of fault

7/134 The yardstick for sufficient care, however, was the degree of care which the law requires of every member of society. Thus, whoever could have foreseen the result had he applied the care required of members of society but did not exercise this degree of care acts negligently. This represents an objective understanding of fault.

C. Confusion within the theory of the law of delicts

7/135 Against the background of increases in delict law proceedings in the 1960s and 1970s, the above-described traditional theory was called into question. There were heated confrontations between those who called for a departure from or adaptation of the wrongfulness theory and those who supported retaining the wrongfulness theory and making it stricter[35].

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33 *Wagatsuma,* Jimu kanri, futô ritoku, fuhô kôi [Negotiorum gestio, unjust enrichment and tort] 126. Here a similarity to the flexible system can be discerned.

34 Cf *Wagatsuma,* Jimu kanri, futô ritoku, fuhô kôi [Negotiorum gestio, unjust enrichment and tort] 103 ff; *Katô,* Fuhô kôi [Tort] 64 ff.

35 *Sawai,* Fuhô kôi hôgaku no konmei to tenbô – ihô-sei to kashitsu [Confusion within the dogmatic on tort and its prospect – wrongfulness and fault], Hôgaku Seminâ 296 (1979) 72.

1. Uniform concept of fault

The view that advocated turning away from or adapting the wrongfulness theory rejected wrongfulness as a prerequisite for liability and considered that wrongfulness was already included under fault[36]. 7/136

a. Arguments for uniformity

(1) Rejection of the concept of wrongfulness

The above view gives the following reasons for not seeing any point in applying the concept of wrongfulness nowadays. The original aim was to expand the expression »right« in art 709 CC. However, in the course of the development from the »infringement of a right« to »wrongfulness« as a prerequisite, the concept of wrongfulness lost its function, so the argument. Limiting delictual liability, according to this view, is accomplished not usually by requiring that there be infringement of a right before someone is held liable but instead that there be fault. 7/137

A look at the case law also shows that wrongfulness does not fulfil any function separately and independently from fault as a prerequisite for liability, the argument goes. In fact, many decisions do not even take wrongfulness as a premise. Even when wrongfulness is drawn upon, then it is only in order to establish whether there was a tort but not, on the other hand, in contrast to fault as a subjective prerequisite of tort. 7/138

(2) Coincidence with fault

For these reasons, supporters of this view argue it is no longer possible nowadays to maintain the distinction between wrongfulness as an objective prerequisite for liability and fault as a subjective prerequisite for liability; instead one must proceed on the basis that an objectivised fault has become the core yardstick for the normative assessment of whether or not there has been a tort. This reasoning is based on the following considerations. 7/139

Firstly, the number of judgments that proceed on the basis of fault in the sense of a breach of a legal duty to do something has risen sharply. It is argued that this shows that fault coincides with wrongfulness. 7/140

The contention is that this phenomenon derives from the necessity to take account of the changes in society. In today's society there have been the following qualitative changes, which have led to an increase in the risk of infringement of rights: for instance, not only has there been fast progress in high speed transportation, such as trains or cars, and an increase in the number of enterprises that produce hazardous substances like electricity and gas using dangerous machines 7/141

36 *Hirai,* Saiken kakuron II Fuhô kôi [Law of obligations Particular part II Tort] 21 ff. More precisely on this, see *idem,* Songai baishô-hô no riron [Theory of the law of damages] (1971) 307 ff.

in the process, the social contact between individual members of society has also become more intense.

7/142 This has meant that the needs for protection have also risen and, in order to meet these new challenges, supporters of this view argue that it is necessary above all to focus on whether someone did not do what he was supposed to do or did something he was not supposed to do and not whether someone sufficiently exercised the will to avoid the occurrence of damage. Therefore, according to this view, it is inevitable that fault be understood as a breach of a duty of conduct.

b. Yardstick for fault

7/143 According to this view, fault in this sense should be determined as follows:

(1) Meaning of fault

7/144 Fault means that the responsibility must be foreseeable and thus, there must be a breach of a recognisable duty to act in a way that the risk of damage occuring be avoided.

(2) Elements to be considered – Learned-Hand formula

7/145 Whether there is such a duty of conduct and, if so, to what extent, must be assessed under consideration of the *Learned-Hand formula,* originating from US-American law, by weighing up the following elements. Firstly, there is the probability of the damage occurring (the probability that a disadvantageous result occurs be caused by the action found to be culpable), ie the dangerousness, and the weight of the injured interest (the weight of the interest that will prospectively be infringed by the action) and, secondly, the interests that will be impaired by the fulfilment of the duty of conduct. If the first two elements outweigh the third, then a duty of conduct must be recongised, so the argument.

2. Stricter application of the theory of wrongfulness and fault

7/146 On the other hand, others argue that the theoretical framework of the traditional doctrine – wrongfulness and fault – should be retained, albeit applied even more strictly and precisely.

a. Blameworthiness of the injuring party

7/147 According to this view, delictual liability is based on the blameworthiness of the injuring party. Therefore, the following two levels of possible blameworthiness are necessary for a duty to compensate to be imputed[37]. The first is a general, objective

37 *Shinomiya,* Fuhô kôi [Tort] 276 ff; *Sawai,* Tekisutobukku jimu kanri, futô ritoku, fuhô kôi [Textbook on negotiorum gestio, unjust enrichment and tort]³ 102 ff.

blameworthiness with respect to the action. This corresponds to wrongfulness. The second is an individual, subjective blameworthiness with respect to the acting party. This corresponds to fault.

b. Concept of wrongfulness and fault

Even within this view there is controversy on how wrongfulness and fault should be understood. **7/148**

It is particularly controversial whether the wrongfulness is to be established on the basis of the result or of the conduct. **7/149**

(1) Wrongfulness established by the result

According to the theory of wrongfulness established by the result, the fact that a result, namely the infringement of a right or legally protected interest, has been brought about and/or the risk that this will happen, is wrongful. Insofar as one understands legally protected interests as being restricted to the relevant individual persons, this follows from the traditional perspective according to which rights are protected against interferences or threats. **7/150**

(2) Wrongfulness of conduct

The theory of wrongfulness of conduct, on the other hand, proceeds on the basis that the wrongfulness is founded in the breach of a duty of conduct laid down by the legal system. This theory began to gain support as the theory of wrongfulness established by the result could no longer be maintained against the background of the modern phenomenon consisting in the »permitted danger«. **7/151**

(i) Increase of useful but dangerous activities

In today's society, our potential to harm one another has grown dramatically due to the advances of science and technology and also because the social contacts between people have become more manifold. However, if one was to see, for example, medical treatment, the use of motorised transportation or the operation of factories as unlawful acts due to their dangerousness and accordingly recognise sweeping liability, then this would paralyse society. **7/152**

(ii) Limitation of liability – infringement of a duty of conduct

Conduct that is dangerous but must be allowed as it is beneficial to the general public only gives rise to liability if the conduct does not correspond to the care necessary in the interaction, ie it breaches a duty of conduct. **7/153**

3. Departure from the structure based on wrongfulness and fault

7/154 In contrast to the above, however, there is also a school of thought that seeks to depart from the German model of distinguishing between wrongfulness and fault. According to this view, it is not necessary to read something into art 709 CC as a prerequisite in the form of wrongfulness when this was originally alien to the Civil Code. Instead it is sufficient to take intention and/or negligence and an infringement of a right as the basis for liability, in line with the wording of the provision[38].

a. Infringement of a right

7/155 According to this view, infringement of a right is a prerequisite that relates to the result of the damaging action. This concerns the question of what constitutes an infringed interest, that is an interest worthy of legal protection.

b. Intention and negligence

7/156 Intention and/or negligence, on the other hand, is a prerequisite according to this line of thought, that relates to the damaging action itself. Thus, this concerns the type and nature of the infringing action, ie the infringement of the duty of conduct.

D. Return to the liberal rights thesis

7/157 In more recent times there is also support for the view that takes subjective rights as the starting point to determine the prerequisites for delictual liability (rights thesis)[39].

7/158 This view wants to reconceive the law of delicts in the light of the constitutional law guarantee of fundamental rights. This concept is based on the following ideas.

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38 *Hoshino,* Koi, kashitsu, kenri shingai, ihô-sei [Intention/negligence, infringement of a right, wrongfulness], in: idem, Minpô ronshû dai-6-kann [Collected essays on civil law vol 6] (1986) 307; *Ikuyo/Tokumoto,* Fuhô kôi-hô [Law of torts] (1993) 114 ff; *Morishima,* Fuhô kôi-hô kôgi [Textbook on the law of torts] (1987) 251 ff.

39 *Yamamoto,* Kôjo ryôzoku-ron no sai-kôsei [New conception of the theory of public order and good morals] (2000) 270 ff; *idem,* Kihon-ken no hogo to fuhô kôi-hô no yakuwari [The protection of fundamental rights and the role of the law of delicts], Minpô kenkyû 5 (2008) 77; *Shiomi,* Fuhô kôi-hô I [The law of torts I][3] 25 f.

1. Necessity for legal protection

a. Rights and legally protected interests that are the object of the law of delicts

This view is based on the idea that the rights and legally protected interests that are the object of the law of delicts can be equated with the constitutional law fundamental rights. Thus, for example, property and other in rem rights, intellectual property rights and rights to claim would correspond to the pecuniary rights protected under the Constitution (art 29 JC). Life, bodily integrity, health, honour and reputation as well as rights to a private sphere, one's own name and image correspond to the personality rights protected under the Constitution as well as the right to pursue happiness (art 13 JC). The different rights to liberty are matched to the psychological and economic rights of freedom protected by the Constitution and in the general freedom of action as well as the right to pursue happiness (art 13 JC). **7/159**

b. Law of delicts as a system to protect fundamental rights

The law of delicts is understood in this line of thought as a system with the purpose of protecting the above-named fundamental rights of the individual from infringements by others[40]. **7/160**

2. Limitation of rights by protection of rights

However, if as explained above one recognises delictual liability in order to protect the rights of the victim, this leads to a limitation on the rights of the injuring party. **7/161**

a. Ban on excessivity

In this context not only are the rights of the injuring party recognised but there is also a ban on excessive restriction by the state. Insofar as this ban on excessivity is not violated, however, protection of the fundamental rights of the victim is necessary. **7/162**

b. Meaning of the principle of fault

Intention and negligence as prerequisites of the present-day law of delicts are understood as prerequisites for liability that have the specific aim of not excessively **7/163**

40 *Yamamoto,* Hôgaku Ronsô 133–4 (1993) 16.

restricting the rights of the injuring party. If liability was imposed on the injuring party even when he had not acted intentionally or with negligence, this would be an excessive restriction of his rights. Therefore, the principle of fault may be seen as a means to prevent such excessive burden.

Part 4 Contractual liability and delictual liability

I. Compensation[41]

A. The rule in the Civil Code

1. Prerequisites for contractual liability

The prerequisites for a claim to compensation for failure to perform are regulated in art 415 CC. According to this provision, when the obligor does not fulfil his obligation fully in accordance with what he owes, the obligee may seek compensation for the resulting damage. The same applies when the performance has become impossible due to circumstances attributable to the obligor. **7/164**

a. Failure to perform

Article 415 CC regulates failure to perform in its first sentence and impossibility in the second. However, the authors did not intend to distinguish between the two cases. Rather, the second sentence was only added because the authors of the Civil Code feared that the expression »failure to perform« could be misunderstood if it were not clear that it included impossibility. The intention of the authors was certainly that impossibility fall within the term failure to perform. **7/165**

b. Attributability to the obligor

Furthermore, the attributability to the obligor not only of the impossibility but also the failure to perform in general, ie that the obligor be accountable for such, was seen as a necessary prerequisite for liability[42]. Therefore, it is undisputed that the prerequisites for a compensation claim due to failure to perform include, on the one hand, the failure to perform in itself and, on the other, that this be attributable to the obligor. **7/166**

41 See *Yamamoto,* Vertragsrecht, in: Baum/Bälz (eds), Handbuch Japanisches Handels- und Wirtschaftsrecht (2011) 502 ff.

42 On the history of the drafting of art 415 CC see *Nakata,* Minpô 415-jô, 416-jô (Saimu fu-rikô ni yoru songai baishô) [Arts 415 and 416 CC (Compensation for failure to perform)], in: Hironaka/Hoshino (eds), Minpô-ten no hyaku-nen III [100 years of the Civil Code III] (1998) 1 ff. Cf also *Kitagawa,* Rezeption und Fortbildung des europäischen Rechts in Japan (1970) 37 ff.

2. Problems

7/167 However, the respective significance of the two prerequisites is problematic when it comes down to detail. This has been the subject of intense debate in Japanese legal theory, sometimes also under the influence of foreign legal systems. With respect to the relationship between contractual and delictual liability, it is especially the debate on the term failure to perform that is of interest here.

B. The term failure to perform

1. Differentiation according to the type of failure to perform

a. Argumentation

7/168 The traditional doctrine[43] is based on the type of failure to perform and considers that art 415 CC regulates three types of failure to perform, specifically default, impossibility and bad performance. Bad performance is understood in this respect as including defectiveness of the deliverable, performing in a defective manner and lack of the necessary care in rendering performance.

b. Reception of the German theory

7/169 This doctrine is quite clearly strongly influenced by German law. The Japanese Civil Code does not distinguish, however, per se between these three forms of failure to perform but sets out uniform prerequisites for the failure to perform. Regardless of this, the traditional doctrine nonetheless interpreted the Japanese Civil Code as if it contained the same rules as the German Civil Code (BGB). This was generally a widespread phenomenon in Japanese legal science from the 1910s to the 1930s and is referred to as theory reception[44].

2. The structure of the obligation relationship as the premise

a. Argumentation

7/170 In comparison, the newer theory since the 1960s does not seek to clarify the prerequisites of failure to perform on the basis of the type of failure to perform but by analysing the duties owed[45]. For instance, depending on the object of the duty, a

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43 Cf *Wagatsuma,* Shintei saiken sôron – Minpô kôgi IV [General law of obligations – Textbook on civil law IV]³ (1964) 98 ff, 143 ff, 150 ff.

44 Cf *Kitagawa,* Rezeption und Fortbildung 23 ff, 68 ff; *idem,* Nihon hôgaku no rekishi to riron [History and theory of Japanese legal science] (1968).

45 Cf *Kitagawa,* Keiyaku sekinin no kenkyû [Investigation of contractual liability] (1963) 349 ff; *Okuda,* Saiken sôron [General law of obligations] (1992) 15 ff; *Maeda,* Kôjutsu saiken sôron [Lec-

distinction is drawn between duties to perform, which concern the interest in the performance, and duties to protect, which are directed at the *»Integritätsinteresse«,* the protection of the goods of the other partner in the relationship. The former are further subdivided into duties to render performance, duties to realise the result of performance and ancillary duties.

b. Influence of German law

7/171 This theory is very obviously strongly influenced by the theory of irregularities of performance (Leistungsstörungen), developed in Germany after World War II. This envisages recognising »positive Forderungsverletzungen« (violations of duties of care between the partners to a contract, other than by delay or supervening impossibility) and breach of contract alongside default and impossibility (which are regulated in the German Civil Code) as irregularities of performance. This means that the crux is what the obligor had promised within the obligation relationship. The analysis of duties developed from the German theory was also integrated into the construction of failure to perform under art 415 CC in Japan.

3. From the uniform failure to perform theory to the theory of breach of contract

a. Uniform failure to perform theory

7/172 In the 1970s and 1980s, however, support grew for the view that art 415 of the Japanese Civil Code was based on a different concept to the rule in the German Civil Code and that there was no need to construe it according to German law[46]. Art 415 CC was considered instead to provide for uniform prerequisities for the external elements of failure to perform in respect of cases where the obligor does not perform in compliance with the purpose of his obligations. It was argued that there was no reason to construe this differently and to distinguish between default, impossibility and non-conforming performance. Rather, art 415 CC manifestly included non-conforming performance as well as *»positive Forderungsverletzungen«,* so that there was no gap to be filled. Thus, so the argument, it is not necessary to discuss whether duties to protect must be recognised as a separate category of contractual duties, besides the duties to perform. In order to apply art 415 CC, it was sufficient to examine whether the obligor had performed consistently with the purpose of his obligation or not.

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ture on general law of obligations]³ (1993) 120 ff; *Shiomi,* Keiyaku kihan no kôzô to tenkai [Structure of contractual rules and their development] (1991).

46 Cf *Hoshino,* Minpô gairon III [Outline of civil law III] (1978) 45 f; *Hirai,* Saiken sôron [General law of obligations]² (1994) 47 ff.

b. Theory of breach of contract

7/173 Thus, the decisive question is: what does consistency with the purpose of the obligation mean? Within the contractual relationship, this is determined by the contract itself. If one proceeds logically from this idea, failure to perform as a prerequisite for a compensation claim under art 415 CC must be understood in the sense of a breach of contract[47].

II. Extension of the contractual duties with respect to their object – protection of the »Integritätsinteresse«[48]

A. Problem issue

1. Violation of the »Integritätsinteresse« within the contractual relationship

7/174 Within the contractual relationship, the »Integritätsinteresse« of one party may be injured by the other. In this context, the question is whether the injured party in this case may claim compensation for breach of contractual duties from the other. The crux is whether the duties to protect the »Integritätsinteresse« of the contractual partner, the so-called protective duties, must also be recognised as contractual duties.

2. Differences between delictual and contractual liability

7/175 If someone's »Integritätsinteresse« is injured, this may also be seen as a case of delictual liability. According to the rules on delicts, a claim for compensation is barred, however, three years after the time when the victim gained knowledge of the damage and identity of the injuring party (art 724 sent 1 CC). This is a significant difference to contractual liability, according to which the compensation claim is prescribed within 10 years after the failure to perform (art 167 para 1 CC). For this reason it is very important in practice whether the protective duty is recognised as a contractual duty or not, in other words whether contractual liability is recognised

47 Cf *Shiomi,* Saiken sôron I [Law of obligations General part I][2] (2003) 22 ff; *idem,* Sôron – Keiyaku sekinin-ron no genjo to kadai [General part – Present status quo and tasks of the doctrine on contractual liability], Jurisuto 1318 (2006) 82 ff; *Yamamoto,* Keiyaku no kosoku-ryoku to keiyaku sekinn-ron no tenkai [Binding effect of the contract and development of the contractual liability theory], Jurisuto 1318 (2006) 92 ff.

48 See *Yamamoto,* Vertragsrecht, in: Baum/Bälz (eds), Handbuch Japanisches Handels- und Wirtschaftsrecht 507 ff.

due to the violation of this duty. Furthermore, liability for auxiliaries is different within the contractual context than in the delictual.

B. Reasons for contractual liability

1. Structural analysis of the contractual relationship of obligation

a. Protective duties as contractual duties

In Japan, those who take their starting premise as the structural analysis of the obligation relationship first argued that protective duties must be recognised as contractual duties[49]. In this respect they were influenced by the German theory on »positive Forderungsverletzung«. **7/176**

b. Establishment of a protective duty

The idea of the protective duty is based on so-called special connections or social contact relationships. The reasoning is that, in such a special relationship, each party exposes his »Integritätsinteresse« to the influence of the other. In order to keep the relationship functioning smoothly, each party must be able to rely on his »Integritätsinteresse« being especially taken into regard by the other. For this reason, parties in such a relationship with each other have a general, mutual obligation, going beyond the duties of conduct based on the law of delicts, to have regard to the »Integritätsinteresse« of the respective other party. The parties to a contractual relationship thus have precisely this duty, which is referred to here as a protective duty. **7/177**

2. Judge-made developments in law – the duty to have regard for the security of the contractual partner

Under the influence of this theory, case law has also recognised this duty to have regard to the security of the contractual partner as a contractual duty. **7/178**

49 Cf *Kitagawa,* Keiyaku sekinin no kenkyû [Investigation of contractual liability] 357, 379 ff; *Okuda,* Saiken sôron [General law of obligations] 18 ff; *Maeda,* Kôjutsu saiken sôron [Lecture on general law of obligations][3] 122 f.

a. Duty of the employer to have regard for the security of the employee

7/179 The existence of such a duty was first affirmed in respect of the employment relationship[50]. According to this school of thought, the employer is bound to have regard for the protection of the life and health of the employee against dangers in order that the employee can work in safety.

(1) Justification of such duties

7/180 The case law invokes the above-mentioned idea of »social contact relationship« to support the argument that the duty to have regard for the security of the other is a general duty deriving from the principle of good faith, which applies to parties in such a relationship with one another. It considers this to be true of employment relationships, since it is essential that the employer take on such a duty and fulfil it for the employee to go about his work without worry.

(2) Scope of the duty

7/181 According to the case law, however, this duty consists only in avoiding risks that are brought about by persons under the direction of the employer or equipment and does not include any general duty of care to protect the life and health of the employee[51].

b. Extension to other contractual relationships

7/182 Subsequently, this duty to have regard for the safety of the contractual partner was also applied to the relationship between the principal in a works context and the employees of a sub-contractor[52] as well as to the relationship between school and pupils in the context of a school contract[53]. In the case law at the lower instances, this duty was also recognised in respect of a contract for a swimming course[54], an accommodation contract[55] and a contract on caretaking[56].

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50 Cf Supreme Court of 25.2.1975, Minshû 29, 143 (Accident in self-defence forces).
51 Cf Supreme Court of 27.5.1983, Minshû 37, 477 (Accident in self-defence forces).
52 Cf Supreme Court of 11.4.1991, Hanrei Jihô 1391 (1991) 3.
53 Cf Supreme Court of 13.3.2006, Hanrei Jihô 1929 (2006) 41.
54 Cf District Court Tokyo of 30.7.2004, Hanrei Taimuzu 1198 (2006) 193.
55 Cf District Court Tokyo of 27.9.1995, Hanrei Jihô 1564 (1996) 34.
56 Cf High Court Tokyo of 29.9.2003, Hanrei Jihô 1843 (2004) 173; District Court Yokohama of 22.3.2005, Hanrei Jihô 1895 (2005) 91.

3. The theory of breach of contract

a. Determination of the contents of the contract

According to the theory of breach of contract, on the other hand, the crux is whether the protection of the »Integritätsinteresse« has become part of the contract[57] or not[58]. **7/183**

(1) Express agreement

If, for example, the protection of the »Integritätsinteresse« is expressly made part of the contractual performance, as for instance in the case of a contract for guarding something, then this is part of the duties to perform which one of the parties undertakes. **7/184**

(2) Implicit agreement and completive interpretation of the contract (ergänzende Vertragsauslegung)

The same applies when the protection of the »Integritätsinteresse« is not expressly promised but constitutes a prerequisite for the contractual performance. For example, it is a necessary prerequisite of an employment contract or a school contract that the employee can work without danger at his workplace or the pupil can learn without being exposed to danger at school. Therefore, in this case the contract can be interpreted as meaning that it has been promised as part of the contract performance that the employee can operate at his workplace or the pupil attend the school without danger. Besides this, the purpose of a contract regarding the transport of people will not be fulfilled either solely in having the customer brought to the destination but only when he is brought there safely without being endangered. In this respect it is also possible to interpret a transportation contract as meaning that the performance promised includes the transportation of customers safely to their destination. **7/185**

b. Extent of contractual liability

Accordingly, it is only necessary to presume a protective duty or duty to safeguard the interests of the other as the basis for statutory contractual liability deriving from the principle of good faith if the parties are not in a direct contractual relationship. This is the case, for instance, of the principal in the context of works and the employees of a subcontractor. In all other cases the issue can be reduced to **7/186**

57 The case law would be bound to require a valid contract as in the case of *culpa in contrahendo* (see below under III.) it only advocates applying the law of delicts given the lack of a contract (see Supreme Court of 22.4.2011, Minshû 65–3, 1405).

58 Cf *Shiomi,* Saiken sôron I [Law of obligations General part I]² 102 ff.

the question of whether the protection of the »Integritätsinteresse« became part of the contractual agreement.

III. Extension of contractual duties in the chronological context – culpa in contrahendo[59]

A. Nature of the liability

1. Culpa in contrahendo

7/187 The idea that legal protection corresponding to contractual liability must be recognised on the basis of good faith when a party sustains injury in the course of contract negotiations as a result of conduct attributable to the other party is also known in Japan as the theory of *culpa in contrahendo*[60].

2. Necessity for culpa in contrahendo in Japan

a. Possibility of categorising it as delictual liability

7/188 Nonetheless, it is hardly necessary in Japan to construe such liability as contractual liability. In the Japanese Civil Code, liability for torts is subject to the general and uniform external elements establishing liability under art 709 CC, so that there is nothing to hinder the categorisation of culpa in contrahendo under liability for tort[61].

b. Practical significance of the different prescription periods

7/189 There are certainly differences with respect to prescription between non-contractual liability on the basis of tortious conduct and contractual liability, namely three years from knowledge of damage and the injuring party in the case of the former (art 724 CC) as compared to ten years from the time when the right may be exercised in the case of the latter (art 166 para 1 and art 167 para 1 CC). In business

59 *Yamamoto,* Vertragsrecht, in: Baum/Bälz (eds), Handbuch Japanisches Handels- und Wirtschaftsrecht 472 ff.

60 *Kitagawa,* Keiyaku sekinin no kenkyû [Investigation of contractual liability] 194 ff, 339 ff; *Shiomi,* Saiken sôron I [Law of obligations General part I]² 529 ff.

61 The Supreme Court (of 22.4.2011, Minshû 65–3, 1405) decided in a case in which the information that would have been necessary in order to decide about concluding a contract was not conveyed to the contractual partner prior to conclusion of the contract that, with respect to the damage which this contractual party sustained by concluding the contract, there was a duty to compensate based on the law of delicts but not due to failure to perform duties under the contract.

relationships, however, liability is usually asserted quickly and this is also reasonable to expect. Therefore, at least in this respect there is hardly any practical necessity to extend the prescription period by qualifying liability for culpa in contrahendo as contractual liability. It would only make a significant difference insofar as liability for auxiliaries is involved.

B. Groups of cases when the contract is not concluded

Culpa in contrahendo firstly comes into question when no contract is concluded. In this context, two groups of cases can be distinguished: **7/190**

1. Breaking off of the contract negotiations

In one group of cases, contract negotiations have been started but later broken off again. **7/191**

a. Case law

According to the case law[62], the parties already have duties of care towards the person and assets of the other party even at the stage of contract negotiations, these duties arising out of the principle of good faith. If one party violates these duties and the other sustains damage as a consequence, the former has a duty to compensate. Accordingly, a party that induces the other to rely on something by its conduct and thus causes this other party to undertake unnecessary expenses or efforts or make legal dispositions on this basis must compensate the damage that the other party suffers as a consequence of this disappointment of its reliance, ie reliance damages. **7/192**

b. Theory of »degree of maturity of the contract«

The more recent theory, however, sees such liability when the contract negotiations are broken off nonetheless as the consequence of an agreement in a broader sense[63]. According to this, it is usual at least in the case of financially significant agreements that the final contract is accomplished by means of a sequence of **7/193**

62 Cf Supreme Court of 18.9.1984, Hanrei Jihô 1137 (1985) 51; Supreme Court of 30.8.2004, Minshû 58, 1763.

63 Cf *Kamata,* Fu-dôsan baibai keiyaku no seihi [How real property agreements come into being], Hanrei Taimuzu 484 (1983) 21; *Kawakami,* »Keiyaku no Seiritsu« o megutte (1)(2) [On »how a contract comes about« (1)(2)], Hanrei Taimuzu 655 (1988) 11; 657 (1988) 14.

agreements regarding individual issues during the course of the contract negotiations. The liability of a party when the negotiations are broken off is, therefore, to be regarded as a consequence of the breach of one of such interim agreements. The scope of the liability thus depends on the respective content of the cumulative interim agreements, the so-called »degree of maturity of the contract«. If, for instance, the content of the contract to be concluded has already been established in the negotiations and only the contract documents remained to be drafted, it should be possible to seek expectation damages.

2. Accident in the course of concluding the contract

7/194 In the second group of cases, the rights of one party are injured by a damaging event in the course of the conclusion of the contract. However, this is nothing other than a case of tort, so that there is nothing to stop art 709 CC being applied.

C. Groups of cases when a contract is concluded

7/195 Liability for culpa in contrahendo is also relevant in cases where the contract has been concluded. Here too, two groups of cases must be distinguished:

1. Ineffectiveness of the contract

7/196 The first group includes cases in which a contract has been concluded but later turns out to be ineffective.

a. Establishment of liability

7/197 In this case too, the prevailing theory is that the party whose conduct caused the other to rely on the effectiveness of the contract must compensate such for the resulting damage. This is based on the idea that, owing to the principle of good faith, each party is obliged to take care during the conclusion of a contract that the other does not suffer damage as a result of an ineffective contract being concluded[64].

b. Scope of liability

7/198 In this case the damage that the other partner sustains as a result of disappointed reliance upon the validity of the contract must be compensated, ie reliance dam-

64 Cf *Wagatsuma,* Shintei saiken sôron – Minpô kôgi IV [General law of obligations – Textbook on civil law IV]² 40.

ages. This includes frustrated expenses, for example or damage that results from rejecting a different, more favourable offer.

2. Inadmissible inducement to conclude a contract

The second group includes cases where the contractual partner has been induced during the course of concluding the contract in an inadmissible manner to enter into a contract he does not desire. The culpa in contrahendo includes in this respect especially cases in which the other partner has been misled by insufficient or inappropriate information and thus caused to enter into a contract that does not correspond to his intentions. **7/199**

a. Problem issue

(1) Duty to inform

It is a prerequisite for liability in this case that a so-called duty to inform is established, ie a duty to disclose necessary information to the other party when concluding the contract. Such a duty to inform is in general inferred from the principle of good faith[65]. In this respect it is assumed that the parties that conduct the contract negotiations with each other are in a close relationship to which the principle of good faith applies. **7/200**

(2) Basis of the duty to inform

If such a duty is broadly interpreted, however, this could contravene the contractual law principle of responsibility for one's own affairs. In business relations, each party must in principle look after the protection of his own interests and thus independently obtain information and avert disadvantageous circumstances. Thus, the question is under what circumstances and for what reasons inappropriate information from the contractual partner can be regarded as a violation of the principle of good faith. In this respect two aspects must be distinguished, namely not providing false information and communicating necessary information[66]. **7/201**

65 Cf *Wagatsuma,* Shintei saiken sôron – Minpô kôgi IV [General law of obligations – Textbook on civil law IV]² 41.

66 Cf *Yamamoto,* Minpô kôgi IV-1 [Textbook on civil law IV-1] (2005) 53; further *idem,* Shôhi-sha keiyaku-hô to jôhô teikyô hôri no tenkai [The Consumer Contract Law and the development of the information model], Kin'yû Hômu Jijô 1596 (2000) 9 ff. Going further *Shiomi,* Saiken sôron I [Law of obligations General part I]² 565 ff.

b. Duty to inform as a duty not to do something

7/202 On the one hand, there is the situation where one party has provided incorrect information to the other. The following two considerations support the idea of a duty not to give false information:

(1) Danger posed by false information

7/203 Firstly, a decision is automatically inappropriate when it is based on false information, even if the relevant party also understood the information provided correctly. False information creates a substantial risk that the other party will be induced as a consequence to make a wrong decision.

(2) Imputability

7/204 Secondly, it is natural that the party providing the information be accountable for this when he himself gave the false information.

c. Duty to inform as a duty of conduct

7/205 On the other hand, there is also the situation where one party does not provide the other with necessary information. In turn, two considerations in this respect support the assumption of a duty to provide the other with necessary information:

(1) Prohibition on damaging others

7/206 One consideration concerns information regarding dangers. If it is foreseeable that the contractual partner will be exposed to a risk of damage to his legal goods, specifically his body, life or assets, it must be assumed that there is a duty to inform the contractual party about this danger. In any other case, the legal position of the contractual partner would already be impaired at the time the contract was concluded due to the lack of information.

(2) Liability of experts

7/207 Furthermore, a duty to inform must also be assumed when it comes to the relationship between experts and laypersons, for the following reasons.

(i) Restoration of the actual freedom to contract

7/208 Firstly, when it comes to transactions entered into between an expert party and a non-expert party, there is a gap in information, meaning there is a large risk that the layperson could enter into a disadvantageous deal without noticing it. This means that in effect the layperson sacrifices his freedom to contract in a sense. In order to actually restore the layperson's freedom to contract, it is necessary to impose a duty to inform upon the expert partner.

(ii) Responsibility of the expert in line with the trust placed in him by society

Secondly, the business activities of experts are only facilitated in the first place by the trust of society in their professional abilities. It is therefore only right and proper that the expert not only draw an advantage from this but that he also bear a correspondingly higher degree of responsibility. 7/209

d. Development from delictual to transaction-based liability

(1) Solution under the law of delicts

If, as just explained above, such a duty to inform is recognised, when this duty is breached, there is both wrongfulness and fault, meaning that delictual liability can be affirmed. And indeed, the lower instances did usually find there was delictual liability in the judgments on consumer disputes that arose frequently in the 1980s and 1990s as well as on investment deals. 7/210

(i) Scope of liability

The compensation awarded in this respect included the reimbursement of expenses that were incurred due to the undesired contract which the party was induced to conclude as a result of false information. Compensating this damage means the victim is restored to the position he would have been in had no contract been concluded. This is often referred to as compensation with restorative effect[67]. One could also say that this duty to compensate essentially negates the effectiveness of the contract. 7/211

(ii) Shortcomings of the rules governing legal transactions

This approach was chosen since, due to the strict rules in the Civil Code regarding legal transactions, the prerequisites for ineffectiveness or recission of the contract in such cases seem difficult to fulfil. 7/212

(2) Solution at the level of the legal transaction

(i) T3heoretical approach

However, there is a contradiction in values if, on the one hand, the contract is seen as effective, but on the other, it is treated in the course of compensation as if it were not. This is why the theory advocates relaxing the prerequisites in these cases as regards rescinding contracts for deceit or misrepresentation and/or by a broad 7/213

67 Cf *Shiomi,* Keiyaku-hô to songai baishô-hô no kôsaku [The interweaving of contract law and the law of damages], in: idem, Keiyaku hôri no gendai-ka [Modernisation of contract law] (2004) 9.

interpretation of the concept of ordre public and public morals in order to be able to assume the ineffectiveness of the contract[68].

(ii) **Solution provided by the legislator**

7/214 Against the background of this development in case law and theory, the Consumer Contract Law promulgated in 2000[69] grants the consumer a right to rescind the contract if he was misled by the entrepreneur engaging in particular, positive actions (art 4 Consumer Contract Law). However, the Consumer Contract Law does not provide for rescission in the case of violations of the duty to inform in the sense of a duty of conduct[70]. At present the Consumer Contract Law is being reformed and the recognition of such a duty will be debated anew.

68 Cf *Yamamoto,* Minpô ni okeru »Gôi no kashi«-ron no tenkai to sono kentô [The development of the theory of the »lack of agreement« in civil law and the investigation of its significance], in: Tanase (ed), Keiyaku hôri to keiyaku kankô [Contract theory and custom] (1999) 149 ff.

69 *Shôhi-sha keiyaku-hô,* Law no 61/2000 as amended by Law no 70/2013.

70 In art 3 Consumer Contract Act, only a duty on the part of the entrepreneur to take measures to clarify things is regulated. On the problem associcated with this provision, see *Yamamoto,* Das Verbrauchervertragsgesetz in Japan und die Modernisierung des Zivilrechts, in: FS Rehbinder (2002) 823 f, 831 ff.

Part 5 The basic prerequisites for delictual liability

I. Damage

A. The concept of damage

In Japan, which in principle does not have restitution in kind, the concept of damage which is to be measured in money is discussed and described below: 7/215

1. Calculable damage – difference method (Differenzmethode)

Traditionally, damage was seen as the monetary difference between the condition of the victim's interests as they would presently be had there been no tort and the condition of his interests as they are now due to the tort[71]. Thus, damage is regarded as the monetary harm sustained by the victim. 7/216

The question is therefore how the monetary difference between the two conditions is calculated. 7/217

a. Accumulation of individual heads of damage

Even when the difference relates to the overall assets, in practice the difference can still only be calculated by taking each individual head of damage and then adding these together. The most important heads of damage in this respect are the following: 7/218

(1) Pecuniary damage

These are firstly the pecuniary (material) disadvantages arising due to the tort. They can further be divided into positive damage (actual loss) and negative damage (lucrum cessans). 7/219

71 Among the advocates of the Difference Method there are those who see the difference between the conditions of the interests as damage (comparison of the actual conditions), and those who see the difference between the respective sums of the assets as the damage (monetary comparison). In Japan, however, it is not always the case that a clear distinction is made between these two standpoints.

(i) **Actual loss (damnum emergens)**

7/220 There is actual damage when the victim's existing assets are actively reduced by the tort. If someone's life or bodily integrity are injured, this may include expenses such as medical costs (of treatment, hospital stays, caregiving, rehabilitation, etc) as well as the costs of converting the victim's home; when things are damaged, this may include repair costs or the expense of procuring a replacement. The reduction in the value of the damaged goods is also taken into account.

(ii) **Negative damage (lucrum cessans)**

7/221 Negative damage, on the other hand, is when it was to be expected that the victim's assets would grow but this does not happen due to the tort. Lost profit falls into this category.

(2) Non-pecuniary damage

7/222 Besides pecuniary damage, non-pecuniary damage can also arise as a result of the tort.

b. Assessment

7/223 In respect of the individual heads of damage, the following methods of assessment are applied.

(1) Pecuniary damage

7/224 With respect to pecuniary damage, the difference is determined on the basis of the costs that really accrued and/or the amount that was really lost in respect of each head of damage. The underlying principle is the compensation of the actual damage.

(2) Non-pecuniary damage

7/225 When it comes to non-pecuniary damage, on the other hand, there are no actual expenses or income to take as the basis; instead the assessment must be made at the judge's discretion taking into account all relevant circumstances, including the gravity of the injury.

c. Problem issue

7/226 The following criticisms have been levelled at the difference method.

(1) Methodological fuzziness

7/227 The theory is criticised for mixing the assessment of the damage in monetary terms with the determination and recoverability of the damage, leaving it unclear what has been determined in what manner.

(2) Inconsistency with the purpose of restoring the original state

(i) Damage not measurable in money

If damage is understood solely as a quantifiable difference expressed in money, any damage that cannot be expressed in monetary terms remains disregarded. This is the case, for example, when the victim is injured by the tort but does not suffer any loss of actual income. **7/228**

(ii) Harm not included in the heads of damage

If the damage is determined by adding together the individual heads of damage and, in particular if the catalogue of damage is seen as fixed, it may also be the case that damage is not included. While the difference method proceeds on the basis that the damage can be comprehensively determined, in reality a comprehensive assessment cannot be made. **7/229**

2. Damage as actual damage

Nowadays, however, one influential view distinguishes between damage and damage assessment and uses the expression »damage« only to refer to an actual state but not the assessment of the harm suffered in money. Thus, a distinction is made between the determination that damage has occurred as well as – taking into account the protective scope – the recoverability of such, on the one hand, and the assessment in money, on the other and these two steps are carried out consecutively[72]. **7/230**

a. Concrete damage

In this respect, it is firstly conceivable that the actual individual impairments to the victim's interests be seen as the damage[73]. **7/231**

(1) Concept of damage

(i) Personal injury

Applying this view, the following facts could, for instance, be seen as damage in the case of personal injury: the fact that the victim, due to the necessity of going to hospital for treatment, must now pay the hospital stay and treatment; the fact that, after being discharged from hospital, the victim had to go for rehabilitation for three months and had to pay the rehabilitation clinic; the fact that the victim is now confined to a wheelchair and had consequently to adapt his home and pay **7/232**

72 *Hirai,* Saiken kakuron II Fuhô kôi [Obligation law Particular part II Tort] 76.
73 *Maeda,* Minpô IV-2 (Fuhô kôi-hô) [Civil law IV-2 (Law of torts)] (1980) 302 f.

a construction company to do so; the fact that the victim, who is self-employed, could not work for three months due to the tort and has lost income accordingly.

(ii) **Damage to property**

7/233 In the case of damage to property, the following facts are examples of what may be regarded as damage: the fact that the victim's motorbike had to be repaired in a garage as a result of the tort (traffic accident) and the victim had to pay for the repair costs; or the fact that the victim lost his motorbike as a result of the tort and had to buy a new one from a dealer.

(2) Assessment

7/234 The amount of damages is assessed as follows using this approach.

(i) **Determination of the damage**

7/235 Firstly, it is necessary as outlined above to determine a fact that constitutes damage. Thus, facts amounting to the (cumulative) heads of damage under the difference method are regarded as damage.

(ii) **Extent of the damages**

7/236 Secondly, it is necessary to assess whether the facts amounting to damage determined above can be regarded as damage brought about by the infringement of a right. This corresponds to the examination under the difference method of whether there is an adequate causal link between the damage and the infringement of the right.

(iii) **Assessment in money**

7/237 Thirdly, the facts amounting to damage which fall within the recoverable scope must be evaluated in monetary terms. This corresponds to the calculation of the difference in amount using the difference method.

(3) Criticism

7/238 However, if concrete facts that correspond to the heads of damage are regarded as damage, it may happen that harm which cannot be identified in terms of such facts is not considered. Besides the case that the victim is injured by a tort but does not suffer any loss of income, regard must also be had to situations such as when a traumatised victim has in fact given up riding a motorbike due to an accident.

b. Comprehensive concept of damage

Nowadays nonetheless, among the ranks of the advocates of the actual damage concept, a view that emphasises the purpose of restoring the original condition and – in contrast to the above-described doctrine of concrete damage – categorises all harm brought about by the tort comprehensively as damage, has become influential. **7/239**

B. The relationship between infringement of a right and damage

If all harm that arises due to a tort is comprehensively regarded as damage in line with this view, the question arises whether a distinction must be made between this damage and the infringement of the (subjective) right. **7/240**

1. Equation of infringement of a right with damage

One view is that there is no distinction to be drawn between infringement of a right and damage. According to this, examining the causal link giving rise to liability and the determination of the extent of recoverable damage fall together. In this respect, there are differences in opinion as to whether the damage must be seen as the impairment of an interest or a value. **7/241**

a. Doctrine of impairment of an interest

(1) Concept of damage

Firstly, it is conceivable that the impairments of any and all interests due to an infringement of a right are to be regarded as damage[74]. **7/242**

(2) Determination and calculation of the damage

The determination and calculation of the damage then ensues as follows: **7/243**

(i) Basic rule

aa. Determination of the damage – addition of the individual heads of damage

As the entire loss as such cannot be determined, the harm must be determined in respect of each head of damage and then added together to arrive at the overall damage. **7/244**

74 *Hirai,* Saiken kakuron II Fuhô kôi [Law of obligations Particular part II Tort] 125 ff.

bb. Assessment of damage

7/245 On this basis the concrete impairment of interest is calculated for each individual head of damage in line with the actual income and expenses.

(ii) Exception

7/246 If, however, part of the damage cannot be taken into consideration within the framework of the individual heads of damage, this will be determined by free discretion via damages for pain and suffering.

b. Loss in value

7/247 On the other hand, it is argued that the reduction in the value of a right due to the infringement of the right constitutes damage. The question that arises here is at which level the value of the subjective right must be evaluated, ie whether the evaluation should be abstract or concrete.

(1) Abstract value – death and bodily injury

7/248 One view taken is that, in the case of personal injury, death and bodily injury constitute damage and should be evaluated by a fixed amount as a standard type of damage. This is based above all on the equality of people and the dignity of the individual and on the principle that people cannot be seen as the source of pecuniary interests but as beings who have an inherent, equal value[75].

(i) Understanding of damage

7/249 This view understands the bodily injury or death of a person as (non-pecuniary) damage. If there is a causal link between the damaging conduct and the bodily injury or death (this corresponds to causation as a prerequisite for liability), then said bodily injury or death constitutes recoverable damage.

(ii) Assessment of damage

7/250 The value lost due to death or bodily injury, ie the value of the life or body, is evaluated in each case by a fixed amount. This means, therefore, that the difference method is rejected as it relies on expenses actually incurred; in its place comes a standard fixed scale for the amount of compensation in accordance with the objective injury to the value of life or of bodily integrity.

75 See ia *Nishihara,* Songai baishô no hôri [Legal principles of the law of damages], Jurisuto 381 (1967) 148.

(2) Concrete value – reduction in earning capacity

In contrast, it is also argued that any loss of capacity to earn on the part of the victim must be regarded as damage and individually evaluated – ie taking into account the circumstances of the specific victim[76]. **7/251**

(i) Understanding of damage

This view sees the reduction of capacity to earn due to bodily injury as damage. Even if in fact no difference has manifested with respect to the income and expenses accruing, the reduction of earning capacity as such is recognised as damage. **7/252**

(ii) Assessment of damage

Therefore, the value of the lost earning capacity is measured in money. Any standard sum in this respect is rejected as earning capacity is different for every victim. **7/253**

2. Differentiation between infringement of a right and damage – normative concept of damage

Another view contends in this context that a distinction must be drawn between infringement of a right and damage. According to this view, the question of which damage arose from the infringement of a right and to what extent this must be compensated must thus be examined separately from the causation giving rise to liability[77]. **7/254**

a. Normative concept of damage

(1) Understanding of damage – comparison of normative circumstances

According to this view, the damage consists in the difference between the victim's circumstances as they would now be had the tort not occurred (A) and the victim's circumstances as they actually are due to the tort (B). **7/255**

(2) Coincidence of damage determination and assessment of compensation

Neither A nor B are natural facts, rather they are normative facts based on a legal evaluation. Consequently, determining the actual condition and the circumstances as they would have been in the absence of the tort, ie by determining the damage, also determines the extent of the compensation. **7/256**

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76 *Kusumoto,* Isshitsu rieki no santei no shotoku-gaku [Calculation of lost profit and income], in: Ariizumi (ed), Gendai songai baishô-hô kôza 7 [Lectures on the modern law of damages 7] (1974) 133.

77 *Shiomi,* Fuhô kôi-hô [Law of tort] 219 ff.

b. Gradation of the concept of damage

7/257 Nevertheless, the question is how to assess what the victim's condition would have been in the absence of the damaging action.

(1) Minimum damage – loss of value

7/258 As the minimum damage the value of the infringed right usually constitutes the recoverable damage.

(i) Grounds – continuation of a right function (Rechtsfortsetzungsfunktion) of compensation

7/259 A claim to compensation due to an infringement of a right leads to compensation of the value in respect of the actual right. Therefore, the state that would have existed had the value of the right not been violated corresponds to state A (condition of the victim as it would now be had there been no tort).

(ii) Determining the damage – abstract calculation of damage

7/260 In such a case the damage is determined by looking away from the actual concrete facts and estimating the value of the lost right, ie the value of life or bodily integrity or the value of a property right, in objective-abstract monetary terms.

(2) Additional damage – impairment of individual interests

7/261 However, when it comes to impairment of an interest that rests on the individual circumstances of the victim and for which no compensation would be due pursuant to the above principles, additional compensation is granted besides the minimum damage.

(i) Equation of determination of damage with determination of extent of damage

7/262 In this case the damage is seen as the sum of individual heads of damage in the sense of the method where the individual heads of damage are added together. For instance, with respect to expenses that were forced upon the victim due to the tort, the question of whether damage is recoverable is assessed based on the necessity of such expenses. As far as income that the victim could have earned is concerned had the tort not ensued, the question of whether this is recoverable damage depends on the probability of such income.

(ii) Determination of the damage – concrete calculation of damage

7/263 The impairment of interest determined in line with the above is assessed in monetary terms with regard to the concrete circumstances.

C. Non-pecuniary damage and compensation for pain and suffering

The Japanese law of delicts sets no limit as to the types of recoverable damage. Non-pecuniary damage is recognised as being recoverable as a matter of course. This is usually compensated in the form of damages for pain and suffering. **7/264**

1. Purpose of damages for pain and suffering

Nonetheless, there is controversy as to the purpose of damages for pain and suffering. **7/265**

a. Theory of restoration to the earlier state

In general, the purpose of damages for pain and suffering is seen as being to compensate the damage the victim sustained and restore a state corresponding as far as possible to the original state. **7/266**

(1) Actual function

However, the views diverge on what constitutes damage or indeed the restoration of the earlier state in such cases. **7/267**

(i) Compensation of non-pecuniary damage (pain)

Traditionally, the purpose of damages for pain and suffering is seen as being to compensate psychological or bodily pain. Nonetheless, there are in turn different views on how damages for pain and suffering can effect compensation of the pain. **7/268**

aa. Compensation of damage

On the one hand, it is argued that by means of damages for pain and suffering non-pecuniary harm is compensated by money[78]. **7/269**

bb. Satisfaction

On the other hand, it is also argued that there is satisfaction in the monetary compensation which in turn restores the emotional balance[79]. *Non-pecuniary* damage (pain) cannot be measured in money. Therefore, it is argued that is it not possible to speak of such harm being compensated. Thus, instead it is only possible to see the damages as providing emotional satisfaction and thus restoration of the lost emotional balance. **7/270**

78 *Katô,* Fuhô kôi [Tort] 228 ff.
79 *Shinomiya,* Fuhô kôi [Tort] 595, 268; *Shiomi,* Fuhô kôi-hô [Law of tort] 263 ff.

(ii) **Impairment of a non-pecuniary value**

7/271 Besides this it is also argued that damages for pain and suffering have the purpose of compensating the impairment of a non-pecuniary value, which the victim possessed. In this context, a distinction is also drawn as to which value is regarded as impaired.

aa. Infringement of an emotional value

7/272 On the one hand, it is argued that human feelings have an objective value and that the impairment of this value is compensated in money[80]. This also explains compensation to people who are not in a position to feel pain (eg infants), as well as standard rates for pain and suffering.

bb. Impairment of the right to an undisturbed life

7/273 On the other hand, it is also possible to recognise a right to an undisturbed life and to see the damages for pain and suffering as compensation for the impairment of this value in monetary terms. If one proceeds from the basis of the right to pursue happiness to a right to an undisturbed life, then compensation is necessary when there is a forced change to this everyday life or life planning. However, a continuation of the infringement of the right to an undisturbed life is also possible even after the tort against the victim has ended. Therefore, when assessing damages for pain and suffering, the conduct of the injuring party after the actual damaging conduct must also be taken into consideration.

(2) Supplementary function

7/274 Further, in practice damages for pain and suffering are frequently drawn on in a supplementary fashion when it is difficult to prove pecuniary damage. The following reasons come into play.

(i) **Inevitability**

7/275 If the damage is calculated by adding together the individual heads of damage and on the basis of the concrete damage, evidence problems are inevitable and require a resolution.

(ii) **Procedural reasons**

7/276 As, furthermore, claims for pecuniary damage and non-pecuniary damage are treated as one suit, the claimant is not bound to a breakdown of the individual heads of damage as long as the amount of damages remains within the amount claimed. Therefore, damages for pain and suffering can be drawn on to supplement the compensation for pecuniary damage.

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80 *Shinomiya,* Fuhô kôi [Tort] 595.

b. Sanction and deterrence

By contrast, it is also argued that damages for pain and suffering fulfil a sanctioning and deterrence function[81]. **7/277**

(1) Reasoning

According to this view, imposing penalties does not always provide sufficient sanctioning and deterrent effects on its own. It is argued that granting very high damages to the victim, which have precisely that aim, is more effective. **7/278**

(2) Criticism

In response to this view, however, the following criticism is levelled[82]. **7/279**

(i) Strict distinction between civil and criminal law

The Japanese legal system is based on a separation between the civil law of damages, on the one hand, and criminal and administrative law rules, on the other hand[83]. Therefore, it is argued that it would be irreconcilable with the Japanese legal system to openly recognise a sanctioning and deterrence function for the civil law of damages. **7/280**

(ii) Interference with the balancing of interests

aa. Excessive protection of the victim

Compensating the actual damage protects the rights of the victim. There is no legitimate interest in receiving any compensation going beyond this. If the law of damages was used in order to sanction and deter, this would mean that the victim would receive an advantage exceeding the compensation of the damage sustained. **7/281**

bb. Excessive interference towards injuring party

Furthermore, duties to compensate cannot be randomly justified by the aim of sanctioning and deterring damaging conduct as the injuring party also has rights that may not be excessively restricted. **7/282**

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81 *Mishima,* Isha-ryô no honshitsu [The nature of damages for pain and suffering], Kanazawa Hôgaku 51–1 (1959) 1; *Goto,* Gendai songai baishô-ron [Theory of the modern law of damages] (1982) 255 ff; *Awaji,* Fuhô kôi-hô ni okeru kenri hoshô to songai no hyôka [The legal protection within the law on unlawful conduct and the assessment of damage] (1984) 156 f; *Higuchi,* Seisaiteki isha-ryô ron ni tsuite – Minkei shunbestu no »risô« to genjitsu [On the theory of damages for pain and suffering as a sanction – »Ideal« and present state of the strict distinction between civil and criminal law], Jurisuto 911 (1988) 19.

82 *Shiomi,* Fuhô kôi-hô [Law of tort] 263 ff.

83 Supreme Court of 11.7.1998, Minshû 51–6, 2573.

2. Calculation of the damages for pain and suffering

a. Concrete assessment

(1) Procedure

7/283 The judge determines the damages for pain and suffering at his discretion; the circumstances that have been established in the oral hearing must be taken into consideration. The judge is not obliged to set out the grounds for his assessment in this respect[84]. On the other hand, neither does the victim have any duty of proof with respect to the amount of damages for pain and suffering[85].

(2) Circumstances that must be taken into account

7/284 The following circumstances must be taken into account when assessing the damages for pain and suffering.

(i) Circumstances connected with the unlawful act

7/285 Firstly, the circumstances connected with the unlawful act must be taken into account. On the side of the victim, these include the conduct of the victim, whether there was fault on the part of the victim and the gravity of such. With respect to the injuring party, this refers to the purpose and motive for the unlawful act as well as the conduct (intention, negligence, etc).

(ii) Circumstances regarding the parties

7/286 Secondly, the circumstances of the parties must be taken into account. Besides the age, profession and societal position of the victim and the injuring party, these include the financial situation and conduct of the injuring party.

b. Standard rates – fixed amounts for pain and suffering

7/287 For typical torts, such as road traffic accidents, there are guidelines for determining the damages for pain and suffering in standard cases, ie where there are no special circumstances[86]. When the main breadwinner of a family dies, these range between JPY 27 and 31 million, for example; when someone who is to be held equivalent to the main breadwinner is killed this is between JPY 24 and 27 million and in other cases between JPY 20 and 24 million.

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84 Cf ia Imperial Court of 5.4.1910, Minroku 16, 273; Imperial Court of 10.6.1914, Keiroku 20, 1157.

85 Cf ia Imperial Court of 20.12.1901, Keiroku 7–11, 105.

86 The reason why the sum is particularly high for death of a breadwinner is that the element of compensation for loss of support payments to the bereaved is included.

D. Damage through unwanted birth of a child

In Japan the question of damage due to the unwanted birth of a child has not yet arisen in practice. Therefore, this problem has not yet been discussed separately in Japan; instead there is only reference to the debate abroad. **7/288**

II. Causation

A. Concept of causation

1. General meaning of causation

Causation means that there is a cause and effect relationship between fact A and fact B. **7/289**

2. Relationship of cause and effect

However, it is questionable how a relationship of cause and effect is interpreted with respect to the causation of a tort. **7/290**

a. Difference between causation and limitation of imputation

(1) Adequate causation

According to the traditional teaching[87] and case law[88] – as under German law – it is a prerequisite for delictual liability that there be an adequate causal link between the injuring act and the result. **7/291**

(2) Three-step model

This means that, when evaluating whether there was adequate causation, the question of limitation of imputation and damage assessment is also decided. The meanwhile prevailing counter-view considers, however, that this makes the evaluation unclear and advocates examining these questions separately, specifically in three steps[89]. **7/292**

87 *Wagatsuma,* Jimu kanri, futô ritoku, fuhô kôi [Negotiorum gestio, unjust enrichment and tort] 154; *Katô,* Fuhô kôi [Tort] 152 ff.

88 Imperial Court of 22.5.1926, Minshû 5, 386.

89 See *Hirai,* Saiken kakuron II Fuhô kôi [Law of obligations Particular part II Tort] 110. Thus, also *Maeda,* Minpô IV-2 (Fuhô kôi-hô) [Civil law IV-2 (Law of torts)] 126; *Ikuyo/Tokumoto,* Fuhô kôi-hô [Law of tort] 116 ff; *Shinomiya,* Fuhô kôi [Tort] 407; *Shiomi,* Fuhô kôi-hô I [The law of tort I]² 362 f, 386 f.

(i) Factual causation

7/293 First it must be established whether the injuring action actually caused the result at issue (infringement of a right or damage) and thus, whether there is factually a causal relationship.

(ii) Protective scope

7/294 The second step is a legal evaluation to examine whether the result (infringement of a right or damage) that is factually linked to the injuring act can be imputed to the injuring party.

(iii) Assessment in money

7/295 The third step is to assess the damage that falls within the protective scope in monetary terms.

b. The nature of the causation test

7/296 This limits the examination of causation to the question of whether there is a factual causal link.

(1) Evaluative assessment

7/297 It is generally recognised that this test is not a factual question in the sense of a natural sciences type test but necessarily includes an element of evaluation. The existence of a causal link is determined by reference to a regularity (Gesetzmäßigkeit) in that it is evaluated whether this regularity applies to a certain factual phenomenon or not. An evaluative element is inevitable in this context.

(2) Factual aspect of the test

7/298 Nonetheless, it is ultimately an assessment of whether there is a factual causal relationship and, thus, it must be distinguished from the legal evaluation with respect to the protective scope.

B. Test

7/299 Causation generally means that there is a cause and effect relationship between fact A and fact B.

1. Test yardstick

7/300 How to determine whether there is a causal relationship between the injuring act and the result (infringement of a right or damage) is controversial.

a. Necessary condition

Traditionally, there was considered to be a factual causal link if one fact constituted a *conditio sine qua non* for the other fact[90]. This is based on the idea that the injuring party is also liable if there are several causes for a particular result consisting in an infringement of a right provided the injuring party's act is a necessary condition for the occurrence of said result. **7/301**

b. A regularity

In contrast, however, one influential school of thought holds that the existence of a factual causal link must be assessed according to whether, on the basis of a generally accepted regularity, it may be assumed that A is the cause of B[91]. This is based on the idea that, insofar as there is a general persuasion as to what is the cause of result B, that is a regularity applies, it is sufficient to assess on this basis whether A is the cause of B. **7/302**

2. Starting points for causation – cause and effect

Whichever school of thought one follows, both require that, in order to assess whether there is a causal relationship, it is necessary that there is a fact (A), which is the cause, and a fact (B), which is the result. **7/303**

a. Cause – injuring party's conduct

Intentional or negligent conduct on the part of the injuring party come into question as the starting point for the causation test[92]. **7/304**

(1) Action

In the case of an action this works as follows. **7/305**

(i) Starting point for causation

The starting point for the causation is action A, which offends against a duty to omit (»do not do A«). For example, the starting point can be an action that offends against the duty of conduct: »do not make any mistakes in medical treatment«, ie an action on the part of the injuring party that constitutes medical mistreatment. **7/306**

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90 *Hirai,* Saiken kakuron II Fuhô kôi [Law of obligation Particular part II Tort] 83.

91 See *Shiomi,* Fuhô kôi-hô [Law of tort] 128; *idem,* Fuhô kôi-hô I [The law of tort I]² 350, 364. This builds on the German criminal law theory, in particular *Engisch,* Die Kausalität als Merkmal der strafrechtlichen Tatbestände (1931).

92 *Shinomiya,* Fuhô kôi [Tort] 412 ff.

(ii) Meaning of causation

7/307 In such a case the causation must be recognised according to the formula of the necessary condition (conditio sine qua non): B would not have occurred, had A not happened. If the victim in the above example would not have been disabled, for example, were it not for the medical error, then causation must be recognised.

(2) Omission

7/308 In the case of an omission, however, it is controversial whether a causal relationship is required.

(i) No necessity for causation

7/309 On the one hand, it is argued that, in the case of omissions, no causation is conceivable and therefore a tort may be assumed regardless of a causal link[93]. This is because, in the case of an omission, an injuring party has in fact done nothing and, thus, there cannot be any conduct of A which may be regarded as the starting point for the causal relationship. This is why only the breach of the duty of conduct would be material, it is argued. However, this is a question of fault. This would mean that, in case of fault, liability should be recognised.

(ii) Necessity of causation

7/310 On the other hand, it is also argued that, even in the case of an omission, it is definitely conceivable that there be a causal relationship and that delictual liability ought only to be recognised if such exists[94].

aa. Starting point for a causal relationship

7/311 According to this view, the omission A, which offends against a duty of conduct (»do A«) is the starting point for the causal relationship. Thus, an omission that offends, for example, against the duty of conduct, »in order to diagnose liver cancer, carry out an effective examination«, ie if no effective examination has been conducted in order to recognise liver cancer, is the starting point for the causation test.

bb. Meaning of causation

7/312 According to the formula of the necessary condition, therefore, causation must be recognised in this case when B would not have happened had A been done. For example, if the victim would not have died had an effective examination to diagnose liver cancer been carried out, causation must be recognised[95].

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93 *Hirai,* Saiken kakuron II Fuhô kôi [Law of obligations Particular part II Tort] 83.

94 *Shinomiya,* Fuhô kôi [Tort] 414; *Sawai,* Tekisutobukku jimu kanri, futô ritoku, fuhô kôi [Textbook on negotiorum gestio, unjust enrichment and tort][3] 223; *Shiomi,* Fuhô kôi-hô I [The law of tort I][2] 347 f.

95 Supreme Court of 25.2.1999, Minshû 53–2, 235.

b. Result – infringement of a right

The result which represents the end of the causal link is an infringement of the victim's rights. In the event that the victim is killed, however, a series of infringements of rights can be identified, in respect of each of which the question of the causal link arises. **7/313**

(1) Death – infringement of the right to life

If the victim dies, this can be seen as an infringement of the right to life. **7/314**

(i) Existence of a causal link

If the victim suffers, for instance, from cirrhosis of the liver and it can be established that appropriate medical treatment (effective examination to diagnose liver cancer) would have prevented his death, then there is a causal link. **7/315**

(ii) Non-existence of a causal link

If the victim falls ill with angina pectoris and it cannot be established that appropriate medical intervention (administration of nitroglycerine, a substance used to treat angina pectoris) would have saved his life, then no causal link can be recognised. **7/316**

(2) Premature death – reduction of life expectancy

The death of the victim may also be regarded as a loss of life expectancy. **7/317**

(i) Life expectancy as a protected legal good

The most fundamental interest of a human is to retain his life and this constitutes an interest that is legally protected (a legal good or right)[96]. Therefore, if there was expectancy of a longer life and this is destroyed by medical malpractice, then this may be seen as the infringement of a right and thus as a tort. **7/318**

(ii) Existence of a causal link

Therefore, if it can be established that appropriate medical treatment (eg administration of nitroglycerine to treat angina pectoris) would at least have saved the victim from dying at that point in time, then the causal link must be recognised[97] and compensation is payable for the reduction of life expectancy[98]. **7/319**

96 Supreme Court of 22.9.2000, Minshû 54–7, 2574.

97 Supreme Court of 22.9.2000, Minshû 54–7, 2574; Supreme Court of 11.11.2003, Minshû 57–10, 1466.

98 However, much smaller amounts are awarded in this respect than are granted as compensation for the loss of life.

C. Competing causes

7/320 The issue becomes problematic, however, when several causes have brought about the result, specifically in the following two cases.

1. The competing cause is a force of nature

a. Problem issue

7/321 One case is when the unlawful act by the perpetrator competes as a cause with forces of nature. This problem arose, for instance, in the following situation: due to ongoing heavy rain there was a mudslide on a public street (ie one built and administered by the state). As the state did not notify citizens of this in time, however, a tourist bus with victim X on board continued along the street with no knowledge of the mudslide and had to stop when it got that far. The heavy rain caused another slide and the tourist bus was swept away and X killed.

(1) Ground for liability

7/322 Since in this case the injuring party (the state) had not passed on information quickly enough and blocked the street, it is possible to speak of defectiveness with respect to the »construction and administration of a public construction« so that liability for a structure under art 2 para 1 State Redress Act may be applicable.

(2) Legal interpretation

7/323 However, in this case there is not only a defectiveness in the construction and administration of a structure on the part of the injuring party (the state), natural forces (mudslide due to heavy rains) have also contributed to the occurrence of the relevant result (infringement of a right or damage). The question here is how this should be taken into account in respect of the prerequisites for and legal consequences of liability.

b. Causation

7/324 Firstly, it is controversial whether this can even be seen as a causation issue.

(1) Quantitative understanding of causation – proportional causation

7/325 One view holds that when several causes have contributed to the occurrence of a result, the causation must be determined under consideration of the extent to

which each individual cause contributed[99]. Hence, causation is treated as a quantitative issue, namely how much each cause contributed to the occurrence of the result. If the proportionate contribution of the forces of nature (eg 40 %) is deducted, then the causal link between the defectiveness of the structure and the administration of the street and the result must be recognised in respect of the remaining share[100].

(2) Qualitative understanding of causation

Generally, however, it is assumed that there is causation if B would not have happened had it not been for A, so that the causal link is either determined to exist or not[101]. **7/326**

c. Not a causation issue

If causation is understood in the second sense, then the problem must be approached from a different perspective[102]. The following possibilities are among the available options. **7/327**

(1) Prerequisites for liability – existence of negligence or a defect

On the one hand, it would be possible that the issue be considered when assessing whether the injuring party was negligent and whether there was defectiveness in the construction or administration of the public structure. In the sample case above, the question would be whether the injuring party was obliged to prevent such consequences as were brought about by the forces of nature (infringements of rights and damage) and/or to undertake precautions against such grave consequences of the natural forces (infringements of rights and damage). **7/328**

99 *Nomura,* Inga kankei no honshitsu – kiyo-do no motozuku waraiteki inga kankei-ron [The nature of causation – theory of proportional causation independent of the extent of the share], in: idem, Kôtsû jiko songai baishô no hôri to jitsumu [Legal principles and practice of the law of damages with respect to road traffic accidents] (1984) 62 ff.

100 District Court Nagoya of 30.3.1973, Hanrei Jihô 700, 3.

101 On proportional causation, see in detail *Kubota,* Kashitsu sôsai no hôri [Legal theory of contributory fault] (1994) 87; *Yoshimura,* Kôgai, kankyô shihô no tenkai to konnichiteki kadai [The development of private law on the environment and the law of environmental damage and its present-day tasks] (2002) 316 f.

102 *Hirai,* Saiken kakuron II Fuhô kôi [Law of obligations Particular part II Tort] 85 ff; *Sawai,* Tekisutobukku jimu kanri, futô ritoku, fuhô kôi [Textbook on negotiorum gestio, unjust enrichment and tort][3] 224 f; *Yoshimura,* Fuhô kôi [Tort]4 101 f; *Shiomi,* Fuhô kôi-hô I [The law of tort I][2] 370 f.

(2) Consequences of liability – determining the amount of compensation

7/329 On the other hand, this issue could be considered when it comes to determining the amount of compensation due. The question in this respect would be whether the amount of compensation should be diminished owing to the role played by the forces of nature.

2. Other injuring acts as competing causes

7/330 Another case is when, besides the injuring party's tort, there were other tortious acts that come into question as the cause of the result (infringement of a right or damage). An example of this would be when both factory Y1 and factory Y2 release sewage into a river and the fish farm downriver that belongs to X is destroyed as a result.

7/331 In this respect, a further distinction must be drawn between the following two cases[103].

a. Cumulative causation

7/332 Firstly, several causes may compete with each other but all also have had the potential to bring about the result on their own. In the above case this would be true if both the sewage from Y1 and the sewage from Y2 would have been sufficient to kill X's fish.

(1) Conditio sine qua non

7/333 If causation is understood in the sense of the *conditio sine qua non* formula, the consequences are as follows[104].

(i) Conditio sine qua non

7/334 If the formula of the conditio sine qua non is applied directly, then the fish would also have died had Y1 not released its sewage into the river; therefore there is no causal link.

(ii) Exceptions

7/335 However, it would be unfair if someone who actually ought to be liable alone is released from liability simply because, as chance would have it, another injuring act also took place. Therefore, it is accepted that this case is to be considered an

103 As in both cases cited below there is a causal link, the question of the extent of compensation also arises.

104 *Hirai,* Saiken kakuron II Fuhô kôi [Law of obligations Particular part II Tort] 84; *Yoshimura,* Fuhô kôi [Tort][4] 102.

exception from the application of the conditio sine qua non formula and liability must be recognised.

(2) Causation in the sense of a regularity

If causation is understood in the sense of a regularity, however, causation must be recognised if, subject to the application of the regularity that fish die when sewage reaches a certain level in the water, it is then possible to say that both the sewage from Y1 and the sewage from Y2 were the causes of the fish dying[105]. **7/336**

b. Necessary interaction of several causes

Secondly, it may further be the case that several causes interact to produce the result, and that none of them by themselves would be sufficient to bring it about on their own. An example would be if neither the sewage from Y1 nor the sewage from Y2 respectively would be enough on their own to produce a fish kill and thus, the fish only died because the two spills interacted. **7/337**

(1) Conditio sine qua non

If causation is understood in the sense of a *conditio sine qua non,* then there is causation in this case as the fish would not have died if the sewage from Y2 had not been released into the river[106]. **7/338**

(2) Causation in the sense of a regularity

If causation is understood in the sense of a regularity, then causation would also be recognised if, under application of the regularity that fish die when the sewage reaches a certain level, both the sewage from Y1 and from Y2 can be seen as the cause of the fish kill. **7/339**

D. Proof of causation

1. Standard of proof

With respect to the proof of causation, the question as to standard of proof arises, ie what degree of proof is necessary in order to persuade the judge when considering the evidence, the following view is generally presented[107]. **7/340**

105 See eg *Shiomi,* Fuhô kôi-hô I [The law of tort I]² 368.

106 *Hirai,* Saiken kakuron II Fuhô kôi [Law of obligations Particular part II Tort] 84 ff; *Shinomiya,* Fuhô kôi [Tort] 423 ff.

107 Supreme Court of 24.10.1975, Minshû 29–9, 1417; Supreme Court of 16.6.2006, Minshû 60–5, 1997.

a. High probability

7/341 High probability that a certain fact brought about a certain result must be proven to establish causation.

(1) No necessity for actual scientific proof

7/342 According to this view, it is not required that actual scientific proof be produced to the effect that absolutely no doubt is allowed.

(2) Simple probability is not sufficient

7/343 Simple probability, however, is not enough. It is considered that, if the court was to form its opinion on the basis of simple probability, this would endanger the public's trust in the fact-finding of the court.

b. Yardstick for evaluating probability

7/344 There is high probability if an average person can be persuaded of the truth of the case without doubt. Requiring that everybody has to be convinced without any doubt whatsoever would ask the impossible of the court and the parties.

2. Burden of proof

7/345 Further, there is the question of which party has the burden of proof as regards causation, ie whose risk it is if the causation is not provable (non liquet).

a. Basic rule

7/346 In principle, the victim bears the burden of proof as regards causation, for the following reasons:

7/347 The principle that the owner of the right must bear the infringements to his rights himself applies in principle. The law of delicts makes it possible, however, to shift this damage to the injuring party. The necessary prerequisites in this respect must therefore be proven by the owner of the right, ie the victim.

b. Exception

7/348 Nonetheless, the victim is aided in the case of evidentiary difficulties by the following means.

(1) Reversal of the burden of proof

7/349 Firstly, the duty to prove that there is no causal link may be shifted to the injuring party. This is the case in the following situations:

(i) **Liability for auxiliaries**

In the case of liability for auxiliaries, the principal is liable when the auxiliary has inflicted damage upon a third party in carrying out the work for the principal. The principal can only free himself from liability by proving that the damage would also have occurred if he had applied appropriate care in selecting and supervising his auxiliary, ie if he proves that there is no causal link (art 715 para 1 sent 2 CC). **7/350**

(ii) **Alternative causation**

If the result has been brought about by one of a number of events but it is not possible to determine which of them, then all obligors are liable jointly and severally (art 719 para 1 sent 2 CC)[108]. A perpetrator can only free himself from liability by proving that there is no causal link between his act and the result. **7/351**

(2) Prima facie proof

Secondly, without changing the allocation of the burden of proof, the evidentiary task may be made easier by allowing prima facie proof. This is applied commonly above all in cases of environmental damage or injury due to medication or food. **7/352**

(i) **Concept**

Prima facie proof means that, if there is a rule of experience according to which the material fact can be assumed if a certain other fact (indirect fact) is established, then the material fact will be presumed insofar as the party with the burden of proof can establish the indirect fact. **7/353**

aa. Burden of proof

In this case the burden of proof remains with the victim, who must prove the material fact. If the causal link cannot be substantiated, this means that there is no causation. **7/354**

bb. Practical significance of prima facie evidence

If the victim proves the indirect fact, the injuring party must render the causation of the material fact improvable by proving special circumstances that mean the rule of experience does not apply. Unlike the reversal of the burden of proof, **7/355**

108 Art 719 para 1 CC states: »If more than one person has inflicted damage on others by their joint tortious acts, each of them shall be jointly and severally liable to compensate for this damage. The same shall apply if it cannot be ascertained which of the joint tortfeasors inflicted the damage«. Although sent 2 refers to »joint tortfeasors«, there does not need to be any particular connection between all the perpetrators according to prevailing opinion today, because sent 1 already applies if such a connection exists. See eg *Shinomiya,* Fuhô kôi [Tort] 792 ff; *Hirai,* Saiken kakuron II Fuhô kôi [Law of obligations Particular part II Tort] 199.

however, the injuring party does not bear the burden of proving that there is no causal link.

(ii) **Cases from practice**

7/356 In the following cases prima facie proof has been allowed:

aa. When the pollution »reaches up to the gates«

7/357 If, in cases of environmental damage, the cause of the illness or the causal substance (A) and the means of pollution (B) are proven and if the source of the pollution reaches »to the doors of the enterprise«, then it is presumed that the toxins and emissions (C) derive from there, insofar as the entrepreneur cannot prove why his factory cannot be the source of the pollution[109]. This relates to prima facie evidence based on the rule of experience that if there is A and B, in general C can be assumed.

bb. Epidemiological causation

7/358 Furthermore, it is possible to observe the reason for a group of people being ill and to explain it and on this basis to establish the individual causation for each individual and their illness. This is known as epidemiological causation[110].

(3) Prerequisites

7/359 In general there are four prerequisites for recognising epidemiological causation. Firstly, that the factor operates for a certain time before the illness breaks out; secondly, that the stronger this factor is, the higher the rate of people falling ill; thirdly, that the special features of the progress of the illness can be explained without any contradiction on the basis of the spread of the factor; and fourthly, that the mechanisms of how this factor operates can be explained as the cause without any biological contradictions.

(4) Significance

7/360 Epidemiological causation is actually causation in respect of a whole group. It is not ensured separately that this applies to causation in respect of the individual victims within this group. However, epidemiological causation is understood as a kind of rule of experience, according to which, when the victim belongs to a certain

109 District Court Niigata of 29.9.1971, Hanrei Jihô 642, 96 (Niigata Minamata case of illness).

110 District Court Tsu, branch Yotsukaichi of 24.7.1972, Hanrei Jihô 672, 30 (Yotsukaichi asthma case). In detail on this, eg *Yoshimura,* Fuhô kôi [Tort][4] 106 f; *Shiomi,* Fuhô kôi-hô I [The law of tort I][2] 377.

group (A), in general it is possible to assume the causal link (B)[111]. Thus, if the victim proves A, then it is up to the injuring party to show that epidemiological causation does not apply in respect of this particular victim by proving special circumstances, in order to establish the non-provability (non liquet) of the causal link. This is the practical significance of epidemiological causation.

111 *Shinomiya,* Fuhô kôi [Tort] 410 ff; *Hirai,* Saiken kakuron II Fuhô kôi [Law of obligations Particular part II Tort] 89 f; *Yoshimura,* Fuhô kôi [Tort]4 108.

Part 6 The elements of imputation

I. Necessity to justify imputation

A. Balance between the rights of the parties

7/361 Within the law of delicts, one issue is how to balance the victim's need for protection of his rights with the injuring party's interest in not having his rights excessively curtailed.

1. Indemnification of damage – protection of the victim's rights

7/362 If someone interferes in the right of another, then granting compensation for the resulting damage represents the minimum of necessary protection for the right. Vice versa, however, any compensation that exceeds indemnification of the damage sustained can no longer be justified by the principle of protecting rights.

2. Restriction of the injuring party's rights by protecting the victim – observance of the injuring party's rights

7/363 Moreover, the rights of the injuring party may not be excessively restricted by the protection of the victim. Therefore, the question that arises is how far protecting the rights of the victim may justify restricting the injuring party's rights.

B. Principles of imputation

7/364 The three following basic concepts can justify restricting the rights of the injuring party; thus, they represent principles of imputation that support making the injuring party liable.

1. Causation

7/365 Firstly, the causation of the infringement of the right or damage forms a basis for the imputation. Whoever has delivered the cause of the relevant result may be held liable for the damage.

2. Fault

Secondly, fault may serve as a basis for imputation, in a twofold manner. **7/366**

a. Basis for liability – blameworthiness of the acting party

Firstly, someone who has injured the rights of another by himself being negligent is obliged to compensate. This is based on the idea that the party who has not acted as he ought to have must necessarily be subject to liability. Thus, the basis for the imputation is blameworthiness of the acting party. **7/367**

b. Grounds for exoneration from liability – protection of freedom of action for the acting party

On the other hand, despite infringement of a right, there will be no liability if the injuring party did not act negligently. This is based on the idea that there should not be liability if someone has acted as he ought to have. This protects the acting party's freedom of action. **7/368**

3. No-fault based liability – strict liability

Thirdly, an accident caused by a source of danger considered by society to be necessary may still result in the liability of the party who possesses the source of danger completely independently of whether there was fault on his part. **7/369**

a. Necessity for no-fault based liability

No-fault based liability can be justified by the following considerations: if activities or things are absolutely necessary for society, then the exercise of such activity or possession of such thing cannot be forbidden, even though it is dangerous. Further, it is frequently impossible to prevent an accident occurring as a result of such a dangerous activity or thing even if the keeper of the source of danger exercises care. If the principle of fault was applied in this context, there would be no protection whatsoever for the rights of the victim. **7/370**

b. Imputation principles of no-fault based liability

In general, the following two principles are cited as the basis for no-fault based liability. **7/371**

(1) Liability based on who controls the source of danger

7/372 Firstly, the damage may be imputed based on who has control of the source of danger. This means that the party who is entitled to control the dangerous activity or thing is liable for the damage resulting from the manifestation of the danger.

(2) Liability based on who profits from the source of danger

7/373 Secondly, the damage may be imputed on the basis of who derives profit from having the source of danger. This means that the party who is entitled to control a dangerous activity or thing and who derives a profit therefrom, is liable for the damage caused by the source of danger.

II. Infringement of a right and wrongfulness

A. Prerequisites

7/374 Article 709 CC sets out the general prerequisites for tort, namely that someone who »has intentionally or negligently infringed the right or legally protected interest of another shall be liable to compensate any damage resulting in consequence«. As already described in detail above (Chapter 3 II), there was intense debate on the prerequisites consisting in the infringement of a right as well as of intention and negligence. If the last described view above is taken as a premise, ie that the primary material issue is the rights (rights thesis), then the prerequisites for liability are as follows.

1. Infringement of a right – protection of the victim's rights

7/375 If the rights of the victim have been infringed, then at least the resulting damage must be compensated in order to protect such. In this sense, the prerequisite of the infringement of a right is understood as a prerequisite to protect the victim's rights.

2. Intention or negligence – limitation of the injuring party's rights

7/376 If the injuring party, however, was also held liable even when he did not act either intentionally or negligently, this would be an excessive limitation of his rights. The prerequisite of intention or negligence thus fulfils a function with respect to the limitation of the injuring party's rights, specifically by justifying such limitation.

B. Difference forms encountered

However, the relationship between infringement of a right and intention or negligence is subject to various different interpretations, depending on what type of right has been infringed in what manner[112]. 7/377

1. Types of rights

The following two types of rights are distinguished 7/378

a. Rights to control something (Herrschaftsrechte)

(1) Significance

The first type of rights is those that are recognised generally as rights to control something (Herrschaftsrechte). This type is distinguished by being clearly defined, namely as the control over a legal good. 7/379

(i) Rights to control pecuniary assets

Examples of this type include the in rem rights, in particular property, but also easements or security interests, and other corresponding pecuniary rights such as absolutely protected tenant rights to immovables. 7/380

(ii) Rights to control related to the person – »physical personality rights«

These rights to control are equated with the rights to life and bodily integrity, which are referred to as »physical personality rights«. 7/381

(2) Prerequisites – infringement of a right and intention or negligence

As this type of right is clearly defined, it is relatively easy to determine whether the right has been infringed; the presence of intention or negligence must be examined separately. 7/382

112 *Yamamoto,* Kihon-ken no hogo to fuhô kôi no yakuwari [The protection of fundamental rights and the role of the law of delicts], Minpô Kenkyû 5 (2008) 136 ff; *Segawa,* Minpô 709-jô (fuhô kôi no ippan seiritsu yôken) [Art 709 ZG (general prerequities for delictual liability)], in: Hironaka/Hoshino (eds), Minpô-ten no hyakunen III [100 years of the Civil Code III] 568 f, 624 f.

b. »Correlative rights«

(1) Significance

7/383 The second type of rights is those in respect of which there must first be a weighing up of interests before the extent of the protection can be determined: the protective scope of a correlative right depends on which other rights are juxtaposed and would in turn be limited by the protection of the correlative right. Therefore, the relationship between the hierarchy of the rights and the gravity of the threatened impairment of the correlative right, on the one hand, and the gravity of the restriction of the juxtaposed rights that would be imposed to protect the correlative right, on the other, must be examined.

(i) **Correlative pecuniary rights**

aa. Relative pecuniary rights

7/384 Within the pecuniary rights, rights that exist in relation to another person, such as contractual positions, rights to claim something or acquisition rights are categorised as relative rights.

bb. Joint pecuniary rights

7/385 Furthermore, correlative pecuniary rights also include rights to public goods (common goods), such as information, mineral resources or the environment. Examples of these are intellectual property rights relating to information of which it is per se not possible to have segregated possession as in relation to material goods, and that artificially delineates these; mining rights, fish farming rights, rights to use water, rights to thermal springs and rights to sunlight, fresh air, adequate ventilation, peace and quiet, views and to enjoy nature.

(ii) **Correlative personality rights**

aa. Intangible personality rights

7/386 Personality rights also include rights that concern the psychological-emotional state of the individual, such as freedom of belief and religion, the protective scope of which is determined in relation to other people's freedom to act, thus rendering them correlative rights.

bb. Relative personality rights

7/387 Furthermore, rights that concern how relationships to others are constituted must be equated with these, in particular when it comes to how family relationships are constituted.

cc. Social personality rights

Rights that concern one's own life image – for instance, how one presents oneself or what one wishes to disclose about oneself – in relation to society, for example name, picture, reputation, reliability and private life (eg rights to control information in this respect) are also correlative rights. **7/388**

(2) Prerequisites – equation of infringement of a right with wrongfulness

In relation to rights of this type, it is often unclear how far these extend as the rights of the victim. Hence, the evaluation of whether a right was infringed is also an evaluation of what another party (the injuring party) is entitled to do as well as whether there is fault. In this case, infringement of a right and fault are frequently not examined separately; instead the issue is just generally whether there was wrongfulness. **7/389**

An example is offered by the following case: X hurt an American soldier in Okinawa when this city was still occupied by the USA after World War II and was consequently sentenced to three years in a penitentiary for bodily harm. After finishing his term of imprisonment, X moved to Tokyo, where he lived peacefully. However, he concealed his criminal record. Ten years later Y, who was involved in the proceeding against X as a jury member, published a novel based on true facts in which he named X without X's permission by his full name, meaning that X's criminal record became general knowledge in his surroundings[113]. **7/390**

(i) Victim's rights – private sphere

In this case, one issue is whether the victim X has a right not to have his criminal record made public. This overlaps with the question of which rights are in play regarding the person that made it public. **7/391**

(ii) Injuring party's rights – freedom of expression

After all we must also ask whether the injuring party Y is entitled to publish a fact-based novel dealing with the criminal record of another or, put differently, whether Y's right to freedom of opinion is not excessively restricted if a duty to compensate is imposed. **7/392**

2. Types of interference

Moreover, two types of interference are also distinguished. **7/393**

113 This case is based on the decision of the Supreme Court of 8.2.1994, Minshû 48–2, 149.

a. Physical inteference

7/394 The first category includes physical injuries. In the case of such, the exercise of a right is impaired without the consent of the owner of such right.

b. Interference with decisions – coincidence of several aspects

7/395 The second category is formed by cases in which damage is sustained due to influence on the will of the victim – for example, due to incorrect information. Typical examples of this are when the victim is induced by misinformation to enter into a disadvantageous contract, or when he consents to a medical procedure he did not actually desire without being adequately informed in advance. Two aspects are at play when it comes to this type of injury.

(1) Infringement of a right to control

7/396 One aspect is that the person or the pecuniary assets of the victim are injured as a result, ie one of the above cited rights to control. In this case it is relatively easy to determine whether such a right has been infringed. Aside from this, the presence of intention or negligence can be examined.

(2) Infringement of a correlative right

7/397 The other aspect is that the victim's right to self-determination, which is a correlative right, has been infringed. In this case, the question of whether there was infringement of a right is examined at the same time as the issue of how the injuring party ought to have acted and whether there was fault.

C. Infringement of relative pecuniary rights – interference with contractual relations

7/398 In order to look at the above-described in more detail, this and the following section will examine some typical groups of cases. This section is dedicated to interference with contractual relations as a type of case belonging to the above-cited infringement of relative rights.

1. Problem issue

7/399 A claim is a right which exists in respect of the obligor. If delictual liability is recognised regarding the interference with such a right, the following issues arise.

a. Intervening position of the obligor

Firstly, the realisation of the claim depends on whether the obligor fulfils the claim. Unlike when it comes to in rem rights or one of the »physical personality rights«, the question of whether the right is infringed may thus also depend on an action of the obligor. Therefore, the question is how the freedom of the obligor should be taken into account. **7/400**

b. Recognisability

Secondly, insofar as there has been no public notification, the existence of the claim or the underlying contract is not recognisable without any effort to uninvolved third parties. If delictual liability is nonetheless recognised on the basis of infringement of a right, there is a risk that the injuring party become subject to an obligation that was not foreseeable to him. **7/401**

2. Traditional view – assessment of the degree of wrongfulness

Traditionally, the problem of interference with contractual relations was handled within the framework of wrongfulness when assessing the degree of wrongfulness[114]. **7/402**

a. Assessment of wrongfulness

This view proceeds on the basis that the question of whether there is wrongfulness is examined by comprehensive analysis of the degree of wrongfulness in relation to the injured interests and the degree of wrongfulness in relation to the nature and type of the injuring act and consideration of the interrelationship of the two[115]. **7/403**

b. Interference with contractual relations

As a claim is a right brokered by the will of the obligor, it is weaker than the in rem rights. For interference with contractual relations to be seen as wrongful, therefore, the degree of wrongfulness of the injuring act must be particularly high. The following types of interference with contractual relations can be distinguished under this aspect[116]. **7/404**

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114 On assessing the degree of wrongfulness in relation to each other see above (no 7/123).

115 *Wagatsuma,* Jimu kanri, futô ritoku, fuhô kôi [Negotiorum gestio, unjust enrichment and tort] 125 f, 127 f, 142 f; *Katô,* Fuhô kôi [Tort] 106 f, 131 f.

116 *Wagatsuma,* Shintei saiken sôron – Minpô kôgi IV [General law of obligations – Textbook on civil law IV]³ 77 f. Cf further *Okuda,* Saiken sôron [General law of obligations] 231 f; *Maeda,* Kôjutsu saiken sôron [Lecture general law of obligations]³ 231 ff; as well as *Katô,* Fuhô kôi [Tort] 118 f; *Ikuyo/Tokumoto,* Fuhô kôi-hô [Law of tort] 68 ff; *Shinomiya,* Fuhô kôi [Tort] 320 ff.

(1) Infringement upon the ownership of a claim

7/405 One type of impairment of a claim is the infringement upon the ownership of a claim.

(i) Degree of infringement of the interest

7/406 As in this case the obligee loses his claim, this is an extremely direct form of infringement. If the obligor, for example, pays to a quasi-possessor of the claim, then this is an effective discharge of such, provided that the obligor has acted in good faith and not negligently (art 478 CC). This discharge of the claim then means that the claim is taken from the obligee.

(ii) Nature and type of the injuring action

7/407 As here there is no difference to an infringement of property rights, liability will be established in the case of intention or negligence as in a usual case of tort.

(2) Interference in the performance

7/408 The other possibility for how a claim can be impaired consists in interference with performance, so that the fulfilment of the claim is impeded. Once again, two forms can be distinguished in this respect.

(i) Extinguishment of the claim

7/409 The first case is when the performance is impeded, eg by destruction of the deliverable or by injuring the obligor, and as a result the claim is extinguished.

aa. Degree of infringement of the interest

7/410 As in this case the obligee's claim ultimately is extinguished, the same applies as when the infringement is upon the ownership of the claim.

bb. Nature and type of the injuring action

7/411 There is controversy as to how the interfering action by the injuring party must be constituted for there to be wrongfulness. The earlier prevailing opinion was that, as in the case of a usual tort, the existence of intention or negligence would be sufficient, since there was no difference in this respect to damage to property[117].

7/412 Nowadays, however, one influential viewpoint is that the injuring party must recognise and accept the infringement of the claim[118] for, if negligence alone was sufficient, this view holds, there would be a risk that the injuring party's liability be boundless.

117 *Wagatsuma,* Jimu kanri, futô ritoku, fuhô kôi [Negotiorum gestio, unjust enrichment and tort] 78.
118 *Ikuyo/Tokumoto,* Fuhô kôi-hô [Law of tort] 70; *Shinomiya,* Fuhô kôi [Tort] 320 f.

(ii) Continued existence of the claim

The second case is when the obligee cannot obtain the performance as the injuring party has concluded a similar contract with the obligor. 7/413

aa. Degree of the infringement of the interest

In this case the wrongfulness of the interference with the obligee's claim is seen as relatively low for the following reasons. 7/414

aaa. Continued existence of the claim

Even though the obligee in this case cannot obtain the actual performance, he still has the right to claim compensation. If the injuring party concludes the same contract with the obligor and there is a conclusive acquisition of a right because the injuring party or a third party who has acquired the thing or right from the injuring party fulfils the prerequisites for third party effect of acquisition of property[119], the obligor's original duty to perform is extinguished with respect to the obligee due to impossibility. If the impossibility is attributable to the obligor, however, then the obligee has a compensation claim against the obligor. 7/415

bbb. Approach taken in the Civil Code

In the case of a double sale, the rule in art 177 CC, according to which the loss or the change of an in rem right can only be asserted against third parties when there has been a registration, means it is possible to assume as follows. 7/416

aaaa. Principle of free competition

In a society that is based on free competition, it is admissible to compete in respect of a legal acquisition against another party who has already acquired an in rem right (but not fulfilled the criteria for third party effect), by offering the former owner of the right more advantageous conditions. 7/417

bbbb. Self-responsibility of the owner of the right

If the person who acquired the in rem right first failed to have this entered in the register immediately, thus securing his own legal position, then it is inevitable in a society based on free competition that he lose this right. 7/418

119 According to Japanese law, the right in the relationship between the parties is already transferred with the conclusion of the contract establishing the obligation (art 176 CC). For the acquirer to be able to assert the acquisition against third parties it is necessary that in the case of movables there be delivery (art 178 CC), in the case of immovables there has been registration in the real estate register (art 177 CC) and in the case of claims there has been notice or entry in a register.

bb. Nature and type of the injuring action

7/419 If the injuring party concludes a contract that competes with the one the obligee concluded, then as a rule this does not yet constitute wrongfulness. Consequently, the wrongfulness in relation to the nature and type of the injuring action must be particularly strong.

aaa. Objective aspect

7/420 To this end, it is necessary, on the one hand, that the injuring party's action be so blameworthy that it cannot be condoned even in a society where there is free competition. This is the case, for example, when unfair actions such as fraud or threat take place or a party unjustifiedly only follows his own interests without any consideration of the interests of others.

bbb. Subjective aspect

7/421 On the other hand, the injuring party must act intentionally in the context of the interference. In this respect it is not only necessary that the injuring party knows that the claim exists and that he infringes it but also that he incite the obligor or work in collusion with such[120]. It is necessary that the obligee's reliance on the obligor fulfilling the claim is disappointed by the active involvement of the injuring party.

c. Criticisms

7/422 The following criticisms are levelled at the above-described traditional view on interference with contractual relations, which is based on the determination of wrongfulness by assessing the degree of wrongfulness in relation to the interests infringed as well as the nature and type of the injuring act in the context of their relationship to one another[121].

(1) Categorisation

7/423 The above-described categorisation gives rise to the following problems.

120 *Wagatsuma,* Jimu kanri, futô ritoku, fuhô kôi [Negotiorum gestio, unjust enrichment and tort] 78 f.

121 *Yoshida,* Saiken shingai-ron saikô [Rethinking the theory of the impairment of rights to claim] (1991) in particular 144 f; *Hirai,* Saiken sôron [General law of obligations][2] 118.

(i) **Problems with respect to the category of the interference in ownership of the claim**

On the one hand, it does not make much sense to list interference in ownership of the claim as a separate category as it is undisputed that such interference is an ordinary tort. **7/424**

(ii) **Problems with respect to the category of the interference with the performance**

If one thinks of the different problems that arise in practice, on the other hand, this shows that the category of interference in the performance covers very diverse cases. These manifold problems cannot be resolved adequately within the categories set out – interference in the ownership of the claim or interference with the performance, continued existence of the claim or extinguishment of the claim. **7/425**

(2) Shortcomings of the legal instruments

The traditional view on interference with contractual relations further requires that, in the case of the category of continued existence of the claim, when there is interference with the performance, there must be particularly serious wrongfulness of the action, in which context intention alone is not enough but instead it is necessary that there have been inducement or collusion. Nonetheless, the question of why the delictual liability should be so limited if the obligee cannot obtain the performance owed to him on the basis of a contract due to an action by the injuring party does arise. This would ultimately mean that it is actually admissible to disregard the contract of another party[122]. **7/426**

3. Theory of breach of contract

In more recent times, however, there has been increasing popularity for the view that looks at the infringement of the claim from the perspective of respect for the contract *(favor contractus)*[123]. **7/427**

122 *Yoshida,* Saiken shingai-ron saikô [Rethinking the theory of the impairment of rights to claim] 673; *Isomura,* Nijû babai to saiken shingai – »Jiyû kyôsô« ron no shinwa (1) [Double sale and infringement of rights to claim – The myth of the theory of »free competition« (1)], Kôbe Hôgaku Zasshi 35–2, 391 ff.

123 *Yoshida,* Saiken shingai-ron saikô [Rethinking the theory of the impairment of rights to claim] 667 f; *Isomura,* Kôbe Hôgaku Zasshi 35–2, 392 f; *Hirai,* Saiken sôron [General law of obligations]^{2} 119 f; *Shiomi,* Fuhô kôi-hô [Law of tort] 108 ff.

a. Aspects of the new approach

7/428 According to this view, the following two forms must be distinguished[124].

(1) Factual conduct – breach of contract by factual conduct

7/429 The first category are cases in which the rights deriving from the contract are infringed by a factual breach, for example by destruction or removal of the thing which is the object of the contract or by locking in the obligor

(2) Legal agreement – breach of contract by contract

7/430 The second category includes cases in which the rights deriving from the contract are infringed by a legal agreement, for example when a second contract that competes with the original contract is concluded. In this respect, the relativity of the contract is the core issue.

b. Reason for categorisation

7/431 The distinction between these two categories is necessary because the rights of the injuring party, which are restricted, are different in the two cases.

(1) Factual conduct – general freedom of action

7/432 If in the case of interference through factual conduct this conduct is seen as a tort, this means that this conduct is not allowed in the first place. Insofar therefore, the injuring party's general freedom to act is restricted.

(2) Legal agreement – freedom of contract

7/433 In the case of interference by legal agreement, however, classifying the contract as a tort would mean it was inadmissible to conclude this contract. To this extent, thus, the injuring party's freedom to contract is restricted. This conflict with the principle of freedom of contract and, moreover, the principle of free competition constitutes a serious problem.

c. Factual conduct – interference in the contract by factual conduct

7/434 In the case of interference by factual conduct, the question that arises is how far the protection of the contractual right to claim justifies a limitation of the injuring party's freedom to act.

124 *Yoshida,* Saiken shingai-ron saikô [Rethinking the theory of the impairment of rights to claim] 670 f.

(1) Intentional interference

If the injuring party knew of the claim's existence and engaged in the conduct that interferes with it anyway, there is no problem with assuming a tort as this is a grave breach of the prohibition on harming other people (harm principle). There is no freedom to infringe other people's rights intentionally. **7/435**

(i) Inducement, collusion

It is certainly an intentional infringement to influence the obligor so that he does not fulfil the claim. **7/436**

(ii) Destruction of the object of the contract, locking in the obligor

Destroying or removing the object of the contract or locking in the obligor constitutes a tort if the injuring party knew that the obligee had a claim deriving from the contract and knowingly accepted the fact that this would not be fulfilled. **7/437**

(2) Non-intentional interference – indirect damage or damage sustained by an entrepreneur

On the other hand, it is problematic when the injuring party had no such intention. This is the case, for instance, when an employee suffers a bodily injury due to a traffic accident and consequently his employer, an entrepreneur, suffers loss. However, this is closely connected with the question of limiting imputation and will thus be discussed in Chapter 7. **7/438**

d. Legal agreement – breach of contract by contract

When it comes to breaches of contract by legal agreement, the following two categories must be distinguished depending on the type of the competing contract. **7/439**

(1) Double sale – inadmissible deprivation of assets by contract

The first category covers cases in which two competing contracts both concern the same asset as their object. The problem here is that the obligee has already concluded a contract regarding the acquisition of a certain asset with the obligor and nonetheless this asset is transferred to a third party due to a second contract being concluded with the same obligor, so that the obligee in the first contract ultimately cannot acquire the asset. **7/440**

(i) Infringement of the victim's rights

The first question that arises is whether one can say that the obligee's rights out of the first contract are infringed by the conclusion of the second contract. **7/441**

aa. Understanding of free competition

7/442 The CC is based on the concept of free competition but the free competition allowed by the CC with respect to the conditions of a contract conclusion only relate to the time until the conclusion of the contract and are no longer applicable when another party has already concluded a contract.

bb. Respect for the contract

7/443 If a contract has already been concluded, then this must indeed also be respected by third parties. If a second contract is nonetheless concluded, this must be seen as infringing the obligee's rights from the earlier contract.

(ii) **Limitation of rights as regards the injuring party**

7/444 However, the question also arises as to how far it is justifiable to restrict third parties' freedom to contract in order to protect the obligee's rights out of the earlier contract. Material in this respect is the nature and type of the damaging act by the third party, in particular the subjective aspects.

aa. Requirement of intention

7/445 It is argued that a tort must be recognised when the third party knew of the earlier contract and nonetheless deliberately accepted infringing it[125]. This is based on the following considerations.

bb. Intentional double contract

7/446 Even a restriction according to which concluding a competing contract in knowledge of the earlier contract is not allowed does not lead to any unreasonable restriction of the third party's freedom to contract.

aaa. Non-intentional double contract

7/447 However, if it was not admissible to conclude a second contract even though the party concluding the contract had no knowledge of the earlier contract, this would lead to an unreasonable restriction of the freedom to contract. After all, there is no duty on the part of the party concluding the contract to research this. This is based on the concept of as-far-as-possible respect for freedom of contract.

125 *Yoshida,* Saiken shingai-ron saikô [Rethinking the theory of the impairment of rights to claim] 674 f. According to *Isomura,* Kôbe Hôgaku Zasshi 35–2, 392 f, however, any such action with just simple knowledge of the infringement of the claim is basically outside the scope of freedom of contract (bad faith).

bbb. Intention or negligence

In this respect, however, it is also argued that there is a tort if the third party has acted intentionally (or in bad faith) or even negligently with respect to the breach of the earlier contract[126]. This is based on the idea that it is not an unreasonable limitation on the third party's freedom to contract if a limitation is imposed to the effect that he is not allowed to conclude a contract if the breach of rights of the parties to the earlier contract is recognisable. This is based on a far-as-possible realisation of the principle of respect for a contract. **7/448**

(2) Solicitation of workers – unfair frustration of work performance by contract

The second category covers cases in which several service contracts, for instance employment contracts or work contracts, compete with one another. The problem here is that the party owing a service may be wooed away by another contract so that the obligee under the first contract does not receive the service. **7/449**

(i) **Basic case – simple solicitation**

aa. Infringement of rights of the victim

With respect to the victim's infringed rights, the following are the special features relevant in this context. **7/450**

aaa. Victim's rights

The obligee under the earlier contract has a contractual right to receive the service from the employee, ie a claim to the employee's work performance. **7/451**

bbb. Freedom to terminate the employment relationship and its imputation

Nevertheless, the employee has the freedom to choose his profession and is also free in general to terminate the employment relationship (art 627 CC). Therefore, the claim to work performance by the employee is not an absolute entitlement or one that is secured so that whatever happens the employer can seek the work performance. **7/452**

bb. Limitation of the rights on the side of the injuring party

The issue is how far the protection of the obligee's rights under the earlier contract justify restricting third parties' freedom to contract. **7/453**

126 *Hirai,* Saiken sôron [General law of obligations][2] 120 f.

aaa. Basic rule – freedom to contract prevails

7/454 In this case, the freedom to contract prevails in principle, so that no tort can be recognised[127]. This is based on the following considerations.

aaaa. Freedom to solicit employees, etc

7/455 If a third party offers better conditions and woos away the employee (obligor), the obligee must put up with this.

bbbb. Freedom to change job

7/456 Furthermore, the employee (obligor) is free to choose his occupation so that he cannot be prevented from deciding to end his employment relationship and take another job.

bbb. Exception – prohibition on inappropriate conduct

7/457 Since, however, the obligee from the earlier contract also has a claim, the prohibition on infringing the rights of others is applicable. If this prohibition on injuring others is breached in a grave fashion, for instance in that the employee is not merely encouraged to change job but also solicited away in a socially inappropriate manner, this does constitute a tort[128].

(ii) **Coincidence with a special right**

7/458 If the victim, however, has another special right worthy of protection, this justifies limiting the employee's freedom to end the employment relationship, as well as the freedom of competition for third parties. The following are two conceivable examples of such special rights.

aa. Infringement of a business secret or of know-how

7/459 Firstly, it is conceivable that the victim possesses a business secret or know-how worthy of protection.

aaa. Infringement of a right on the part of the victim

7/460 Know-how and business secrets are intangible assets of the victim. If these are betrayed to the competition, this would be an infringement of these goods. For this reason the employee is subject to a duty of non-disclosure even after leaving the employee as well as a duty not to work for a rival enterprise for a certain period of time.

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127 District Court Tokyo of 25.8.1993, Hanrei Jihô 1497, 86.

128 *Yoshida,* Saiken shingai-ron saikô [Rethinking the theory of the impairment of rights to claim] 675; see also Supreme Court of 25.3.2010, Minshû 64–2, 562.

bbb. Restricting the rights of the injuring party

In order to protect the victim's rights, the procedure will be the same as in the case of an ordinary tort in that liability is recognised if the injuring party acted intentionally or negligently[129]. **7/461**

bb. Breach of an exclusive or sole contract

Secondly, it is conceivable that the victim concluded an exclusive or sole contract with the victim. **7/462**

aaa. Breach of the rights on the part of the victim – exclusive or sole contract

The infringed rights of the victim display the following special features in this case. **7/463**

aaaa. Reinforcement of victim's rights

In this case, the victim has an entitlement that the obligor not work for others. **7/464**

bbbb. Restriction of the obligor's freedom

Furthermore, the obligor's freedom to conclude a contract with another is limited by the exclusive or sole contract with the victim. Therefore, he himself gave up the freedom to terminate the employment contract without cause. **7/465**

bbb. Restriction of the rights on the part of the injuring party

In order to protect the victim, the procedure is the same as in the case of any other tort to recognise liability if the injuring party acted intentionally or negligently. For in the case of an exclusive or sole contract, third parties are not allowed to offend against the contract either. In this case, respect for the contract is especially highlighted. **7/466**

D. Infringement of public pecuniary rights – nuisance affecting neighbours and the environment

1. Problem issue

A further concrete example for the relationship between infringement of a right and wrongfulness may be the infringement of public property rights, in particular the environment. **7/467**

129 According to art 4 of the Unfair Competition Act, anyone who intentionally or negligently injures the business interests of another by unfair competition is liable to compensate the resulting damage.

a. Feature of the right

7/468 As someone's »enjoyment of the environment« is inevitably influenced in many ways by the conduct of neighbours, it is essential to achieve a balance between the rights of neighbours.

b. Nature and type of the interference

7/469 In this case, there are the following two forms in relation to the nature and type of the interference[130].

(1) Positive infringement – emissions

7/470 One form is the infringement of someone's »enjoyment of the environment« by emissions from outside, such as smoke or noise. In this case, there is a certain resemblance to a physical attack.

(2) Negative infringement

7/471 The other form is an outside change, for example by blocking someone's view or sunlight or by destroying the landscape so that his »enjoyment of the environment« becomes impossible.

c. Object of the interference

7/472 There are two options with respect to the object of the interference.

(1) Infringement of assets or victim's body

7/473 On the one hand, it is possible to be injured in terms of assets or physically (health) due to deterioration of the environment.

(2) Infringement of the actual enjoyment of the environment itself

7/474 On the other hand, enjoyment of the environment can in itself be injured. In this respect the question arises whether a right to enjoy the environment must be recognised in respect of each individual and, if so, how far this extends.

2. Positive infringement – damage to health and lifestyle by noise

7/475 Such disturbances in how someone leads his life are becoming a serious problem with increasing urbanisation. Impairments by noise, smell or smoke are typical examples. Below, the basic considerations are represented using the example of noise.

130 Supreme Court of 27.6.1972, Minshû 26–5, 1067.

a. Tolerance limit

An approach has been developed according to which the wrongfulness of an impairment in such cases must be assessed subject to whether the limit of what must be tolerated in everyday social life has been exceeded[131]. **7/476**

(1) Within the limits of tolerance

If the damage does not exceed the limit of what must be tolerated, then the rights of the victim have not been wrongfully infringed, thus the injuring party's act was lawful. **7/477**

(2) Beyond the limits of tolerance

If, on the other hand, the damage exceeds the limit of what must be tolerated, then this means that the victim's rights have been wrongfully infringed and thus, the injuring party's act was unlawful. **7/478**

b. Yardstick to assess the limits of tolerance

(1) Necessity to protect the victim's rights

With respect to the limit of tolerance, the first question that arises is how necessary it is to protect the victim's rights. **7/479**

(i) Legal nature and scope of the infringed interests, extent of the injury

The necessity for protection depends (1) on the legal nature and scope of the infringed interests and (2) on the extent of the impairment. **7/480**

aa. Bodily integrity, health

If bodily integrity and health are injured, this generally justifies awarding damage. **7/481**

bb. Undisturbed life

If the damage does not exceed an impairment of the undisturbed lifestyle, then the question is whether there has been a serious infringement. **7/482**

(ii) Regional differences

Moreover, (3) the extent to which the victim's rights are protected depends on where he lives and his surroundings. **7/483**

131 Supreme Court of 16.12.1981, Minshû 35–10, 1369; Supreme Court of 24.3.1994, Hanrei Jihô 1501, 96.

aa. Social influences on the right

7/484 Firstly, we must ask what is recognised in the relevant region as a right? The right to enjoy the environment can vary from city to countryside and depending on whether a residential, commercial or industrial setting is concerned.

bb. Knowledge and recognition of changes

7/485 Furthermore, it must be examined whether the victim set out a certain state of the region as a requirement when acquiring and holding the right. At least if he knew which region was involved, it is not possible to speak of any right to enjoy the environment exceeding this.

(2) Appropriate exercise of right by injuring party

7/486 Secondly, in assessing the limits of tolerance there is the issue of how appropriate the injuring party's exercise of his right was. Only when it is established that this was appropriate, can tolerance be required from the victim.

(i) **Extent of the infringement of the prohibition on inflicting damage upon another**

7/487 Here too, the prohibition on damaging the rights of another applies. If this prohibition has been violated to a serious degree, it is not possible to assume there was appropriate exercise of a right, meaning that the victim cannot be required to tolerate such.

aa. Nature and type of infringing act

7/488 The extent of the infringement of the prohibition on inflicting damage upon others depends (4) on the nature and type of the infringing act. In this respect, it is necessary to examine whether the injuring party knew of the infringement, willfully ran the risk of it or even intended it.

bb. Start and continuation of the infringing act

7/489 Furthermore, the extent of the violation of the prohibition on inflicting damage upon others also depends (5) on the start of the infringing act and its continuation.

(ii) **Measures to avoid the damage as well as their scope and effect**

7/490 Besides this, the extent of the violation against the prohibition on inflicting damage upon others also depends on whether – if there was damaging conduct in the first place – (6) the injuring party took measures to prevent the damage and, if so, which these were and what effect they had.

(iii) Compliance with administrative law provisions

Furthermore, the extent of the prohibition on inflicting damage upon others depends on whether (7) administrative law provisions were observed. However, this only applies when the purpose of the relevant administrative law rule is to protect the victim's rights. Therefore, it cannot simply be assumed without further ado that there was a wrongful *infringement of a right* because a legal provision was infringed[132]. 7/491

(iv) Public concerns and necessity for community welfare

Moreover, it is controversial when determining the limit of tolerance, how far it must be considered (8) in which manner and to what extent public concerns are affected by the infringing act and to what extent community welfare depends on these. 7/492

aa. Affirmative view

According to the affirmative view, the damaging act is legitimate if the public interest in it is high; thus, the victim must tolerate it. 7/493

bb. Negative view

According to the opposite view, on the other hand, public interests or the requirements of community welfare do not provide sufficient grounds to compel the victim to tolerate the infringement of a right[133]. This view is based on the following considerations. 7/494

aaa. Basic rule

If in such a case no compensation is granted, then the rights of the victim would be completely unprotected. The public interest cannot justify robbing the victim in this manner of his minimum protection[134]. 7/495

bbb. Exception – requirement of reciprocity

However, if not only the public interest and the necessity for community welfare is great but also the victim too would gain a corresponding advantage, this may be regarded as an additional ground to require tolerance by the victim[135]. 7/496

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132 Supreme Court of 24.3.1994, Hanrei Jihô 1501, 96.

133 *Awaji,* Kôgai baishô no hôri [Legal principles of liability for environmental damage] (1978) 239; *Shinomiya,* Fuhô kôi [Tort] 366; *Sawai,* Tekisutobukku jimu kanri, futô ritoku, fuhô kôi [Textbook on negotiorum gestio, unjust enrichment and tort]^{3} 150.

134 This can be inferred also from art 29 para 3 JC, which also requires just compensation when something is taken for public use.

135 Supreme Court of 16.12.1981, Minshû 35–10, 1369.

E. Correlative personality rights – private sphere

7/497 Lastly, the infringement of correlative personality rights, in particular the right to a private sphere, shall be discussed as an example here of the relationship between infringement of a right and wrongfulness.

1. Concept of the private sphere

7/498 There is debate on how the concept of the private sphere should be understood.

a. Right to keep private life secret

7/499 According to one view, there is a right, if so desired, to »be left alone«, as well as a right not to have one's private life made public without one's permission[136].

b. Right to control information in this respect

7/500 According to another view, the private sphere is the right to control information concerning one's own person oneself[137]. The focus here is not the preservation of private secrets but on active and autonomous decision-making on how much should be disclosed to whom.

2. Examination of infringement of private sphere

a. Prerequisite for the protection of the rights of the victim – infringement of the private sphere

7/501 Firstly, it is necessary that the private sphere of the victim has been infringed.

(1) Public matter

7/502 A public matter is a matter in which society has a legitimate interest; it is in principle excluded from the private sphere. For instance, matters connected with crimes or court judgements affect, inter alia, the security of the public, the legal protection of the citizens and the due and proper functioning of the organs of the state, and thus are generally not covered by the private sphere.

(2) Criminal record

7/503 In this connection, the question is whether there is a right not to have a criminal record made public without consent. The following considerations are relevant.

136 District Court Tokyo of 28.9.1964, Ka-Minshû 15–9, 2317.

137 *Satô,* Kenpô [Constitution][3] (1995) 453 f. Cf also Supreme Court of 12.9.2003, Minshû 57–8, 973.

(i) Progression of time

If after a certain time has expired something has been forgotten by the average person, then there is no longer a justified public interest in knowing and the criminal record becomes part of the private sphere. However, as there are also events, for instance historical crimes, that remain in the public eye even after some time, the passing of time alone can hardly be seen as decisive. **7/504**

(ii) Resocialising criminals

According to this view, there is a right to be reintegrated into society and be allowed to lead a quiet life if one has atoned for the crime by being sentenced and undergoing the punishment[138]. **7/505**

b. Prerequisites for limiting the rights of the injuring party

The protection of the victim's rights leads in such cases necessarily to a limitation of the injuring party's freedom to express his opinion. The difficult issue is to what extent such limitation is justified. **7/506**

In relation to making a criminal record public, this is evaluated as follows[139]. **7/507**

(1) Degree to which the injuring party's rights are limited

(i) Grounds for freedom of expression to prevail

If society's interest with respect to the historical or social significance of the event, the importance of the people involved or the social activities of the victim or his influence is assessed as minor, there is hardly any reason to allow freedom to express one's opinion to prevail. **7/508**

(ii) Extent of the limitation on freedom of expression

If the significance and necessity of using the correct name of the person involved is small in relation to the purpose and nature of the work, then freedom of expression is only negligibly impaired by a ban on using the real name. **7/509**

(2) Necessity for protection of victim's rights

If it is crucial for the victim with respect to his future life that his criminal record is not made public, then this justifies limiting the injuring party's right to freedom of expression. **7/510**

138 Supreme Court of 8.2.1994, Minshû 48–2, 149.
139 Supreme Court of 8.2.1994, Minshû 48–2, 149.

III. Fault

A. The concept of fault

7/511 In the context of fault, the first question is how the concept of fault is actually understood.

1. Subjective fault

7/512 Previously the influential view was that fault means personal blameworthiness of the acting party.

a. Meaning of the concept

7/513 According to this view, fault (negligence) means that the occurrence of the damage is not discerned due to defective exercise of will and the resulting lack of care[140].

b. Purpose

7/514 This is based on the idea that the party who does not adequately exercise his will is in any case liable for the compensation of the damage.

2. Objective fault

7/515 Nowadays, however, the prevailing opinion is that fault is a ground that justifies imposing the liability to compensate the damage on the injuring party.

a. Meaning of the term

7/516 Accordingly, fault (negligence) is seen as a breach of the duty to act with the care necessary to avoid the harmful result[141].

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140 *Wagatsuma,* Jimu kanri, futô ritoku, fuhô kôi [Negotiorum gestio, unjust enrichment and tort] 105; *Katô,* Fuhô kôi [Tort] 64. However, as the care generally required in society is taken as the yardstick *(Wagatsuma,* Jimu kanri, futô ritoku, fuhô kôi [Negotiorum gestio, unjust enrichment and tort] 105; *Katô,* Fuhô kôi [Tort] 68 f), this already incorporates an objective element.

141 *Maeda,* Minpô IV-2 (Fuhô kôi-hô) [Civil law IV-2 (Law of torts)] 35 ff; *Hirai,* Saiken kakuron II Fuhô kôi [Law of obligations Particular part II Tort] 27 ff; *Shinomiya,* Fuhô kôi [Tort] 303 ff; *Morishima,* Fuhô kôi-hô kôgi [Textbook on the law of tort] 178; *Sawai,* Tekisutobukku jimu kanri, futô ritoku, fuhô kôi [Textbook on negotiorum gestio, unjust enrichment and tort][3] 178.

b. Purpose

The underlying concept is that for liability to compensate the damage to be imposed, it is sufficient that the injuring party did not do what he was supposed to do. This is based on the following considerations. 7/517

(1) Social change – increased risk

The basic premise is the assumption that today's society has seen qualitative changes, which means that the risk of rights infringements rises. On the one hand, the developments in high speed transportation, such as trains or cars, as well as enterprises that produce dangerous substances such as electricity or gas by using dangerous machines, and on the other hand, the intensification of social contacts between members of society, are material in this sense. 7/518

(2) Increase of the need for protection and its impact on the concept of fault

Against the background of these developments, the need for protection has risen. In order to meet this need, the crux must be whether someone did not do what he ought to have done or did something that he ought not to have done and not the exercise of his will to avoid the damage. 7/519

B. Object of fault

1. Problem issue

The second question in the context of fault is which acts or omissions constitute fault. 7/520

a. Object of fault

In general, there is deemed to be fault when the result is not avoided. If one assumes that it is not admissible to infringe the rights of others, then at the least a duty to avoid the harmful result, ie the infringement of the rights, must be recognised. 7/521

b. Duty to avoid the result

This duty to avoid the result is based on the following considerations. 7/522

(1) Basis of the duty – possibility of avoidance

If – without taking the will of the injuring party as the premise – it is assumed there was a breach of duty and thus liability is justifiable, this requires that the in- 7/523

juring party did not do what he could have done. For, if something which was not possible is required of him, this would be an excessive curtailment of the freedom and rights of the party accused of breaching a duty.

(2) Material factor of possibility

7/524 The prerequisite that the injuring party could have done something involves the following two aspects:

(i) Avoidability

7/525 Firstly, this means that the injuring party did not avoid the result although he could have.

(ii) Foreseeability

7/526 Secondly, this means that the injuring party did not foresee the result although he could have foreseen it and accordingly prevented it.

2. Avoidability

7/527 It is controversial whether avoidability must be assessed separately to foreseeability.

a. Foreseeability as sole prerequisite for the duty to avoid

7/528 According to one view, a duty to avoid the result must be recognised if the result was foreseeable. The argument is that if the result is foreseeable, then it is not admissible to engage in the damaging act and, thus, the result must be avoided by desisting from the act. This view requires that the harmful result be avoided by ending the damaging act[142].

b. Avoidability as an additional prerequisite besides foreseeability

7/529 On the other hand, it is predominantly assumed that foreseeability of the result cannot automatically give rise to a duty to avoid it but instead that the existence of such a duty must be assessed with respect to the real avoidability in the situation. In this respect, the question is which measures may be required of the injuring party in order to avoid the result.

142 Appellate Court Osaka of 29.7.1915, Shinbun 1047, 25 (lower instance decision on Imperial Court decision of 22.12.1916 see below FN 143).

(1) Reasonable measures of avoidance

Case law merely requires that reasonable measures be taken, as is usual in the case of such actions or activities[143]. **7/530**

(i) Argumentation

Measures that exceed what is reasonable represent for the injuring party »something that he cannot do«, ie something impossible. Accordingly, even when the result is foreseeable, only reasonable measures can be required of him. Insofar as the injuring party has taken reasonable measures, he may continue with the relevant act or activity. **7/531**

(ii) Problem issue

This can be understood in two different ways; however, neither interpretation is unproblematic. **7/532**

aa. Maintenance of the status quo on the part of the injuring party

One possible interpretation is that measures to avoid damage may be required of the injuring party insofar on the balance as they are advantageous for the injuring party in comparison with his present situation. This means that the question of how far the injuring party's rights can be limited in order to protect the victim's rights is understood in the following sense: what is reasonable to require of the injuring party without impairing his rights? This gives precedence to the status quo of the injuring party; however, it is far from self-evident that this interpretation is correct. **7/533**

bb. Emphasis on the social value

According to the second possible interpretation, as long as the relevant act or activity has a general value for society, no further-reaching measures may be required than those which are reasonable in order to avoid the damage. The underlying idea is that society should not derive excessive disadvantage from the avoidance of the result. However, taking such an interest on the part of the general public as a basis to refuse the victim protection of his factually endangered rights is problematic[144]. **7/534**

(2) Further possibilities

Besides these, the following views are also conceivable. **7/535**

143 Imperial Court of 22.12.1916, Minroku 22, 2474 (Osaka Alkali case).

144 *Sawai,* Tekisutobukku jimu kanri, futô ritoku, fuhô kôi [Textbook on negotiorum gestio, unjust enrichment and tort][3] 176 f; *Shiomi,* Fuhô kôi-hô [Law of tort] 158.

(i) Best measure of avoidance

7/536 For instance, the standard may be that taking the most suitable measure with respect to the relevant act or activity is required[145].

(ii) Complete avoidance

7/537 On the other hand, even desisting from the act or activity can be required as the relevant measure[146]. If the result would still happen despite taking the best measure of avoidance, there remains only the option of completely desisting from the relevant act or activity.

3. Foreseeability

a. Necessity of foreseeability

7/538 It is controversial whether foreseeability is a prerequisite for fault.

(1) Foreseeability not necessary

7/539 One view holds that the injuring party is liable regardless of the foreseeability if he engages in an act resulting in a harmful result exceeding the limit of what must be tolerated by the victim[147]. The reason for this is that a strict requirement of foreseeability means that the victim would have to bear unforeseeable damage and thus the injuring party, who enjoys the advantages of the dangerous activity, would be freed from liability. This would not be a fair distribution of damage.

(2) Foreseeability necessary

7/540 The majority consider, however, that foreseeabilty is a necessary prerequisite for establishing a duty of conduct[148].

(i) Reasoning

7/541 This is for the following reasons.

aa. Prerequisite duty of conduct

7/542 Firstly, it is not possible to say that the injuring party had to avoid and could have avoided the result if he could not foresee the result.

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145 It is possible that the Appeal Court Osaka of 27.12.1919, Shinbun 1659, 11 (new decision in the Osaka Alkali case after being referred back from the Imperial Court) proceeded on this premise.

146 District Court Niigata of 29.9.1971, Ka-minshû 22–9/10 Bessatsu, 1 (Niigata Minamata illness).

147 *Awaji,* Kôgai baishô no hôri [Legal principles of liability for environmental damage] 45 f, 95 f.

148 *Hirai,* Saiken kakuron II Fuhô kôi [Law of obligations Particular part II Tort] 27 f; *Morishima,* Fuhô kôi-hô kôgi [Textbok on the law of tort] 182 f; *Sawai,* Tekisutobukku jimu kanri, futô ritoku, fuhô kôi [Textbook on negotiorum gestio, unjust enrichment and tort][3] 174 f; *Shiomi,* Fuhô kôi-hô I [The law of tort I][2] 294 f.

bb. Non fault based liability camouflaged as fault liability

Secondly, it would amount to recognition of non fault based liability under the cloak of fault liability if in such cases a duty of conduct and thus fault was assumed[149]. **7/543**

(ii) What must be foreseeable

Furthermore, there is debate as to the object of the foreseeabiliy, ie what must be foreseeable. **7/544**

aa. Concrete risk

One view is that the specific result must be foreseen[150]. If the acting party only foresees an abstract, undefined result, he does not know what measure he must take in order to avoid the result; therefore, it cannot be said that he would have been able to avoid the result. **7/545**

bb. Abstract risk

According to another view, it is sufficient that the occurrence of some disadvantageous result be foreseeable in the abstract[151]. For at least when as yet unknown dangers are involved, such as in the case of environmental damage or damage due to medication, the ban on inflicting damage upon others requires that, if there is a risk of a rights infringement, information be obtained or scientific investigations carried out in order to avoid the damage. **7/546**

b. Stricter duty to make efforts to foresee the damage

In order to help the victim to obtain compensation for the damage, case law often proceeds on the basis that the injuring party has a duty to make efforts to recognise the risk of damage. If such a duty is infringed, then it is assumed that there was foreseeability and thus a tougher yardstick is applied to this obligation to recognise. **7/547**

(1) Typified conduct rules

If there are typified conduct rules and these are violated, then it is no longer necessary to take concrete foreseeability as the basis. **7/548**

149 *Morishima,* Fuhô kôi-hô kôgi [Textbook on the law of tort] 185 f; *Shinomiya,* Fuhô kôi [Tort] 332 ff.

150 See *Morishima,* Fuhô kôi-hô kôgi [Textbok on the law of tort] 190 f. Similar also *Hirai,* Saiken kakuron II Fuhô kôi [Law of obligations Particular part II Tort] 27 f.

151 *Sawai,* Kôgai no shihôteki kenkyû [Private law investigations on environmental damage] (1969) 176; *Shiomi,* Fuhô kôi-hô I [The law of tort I]² 294 f.

(i) Typical accidents

7/549 Regardless of the concrete foreseeability of the result, it is assumed that there is fault when typified duties of care are breached, for example traffic rules[152].

(ii) Extraordinary circumstances

7/550 However, if extraordinary circumstances arise, no measures to prevent or avoid the damage can be expected from the injuring party if the concrete risk was not foreseeable. This can be seen as an application of the principle of reliance, according to which it is admissible to rely in traffic on other drivers to observe the rules of conduct and will resort to reasonable conduct in order to avoid a crash with their car[153].

(2) Introduction of a duty to investigate

7/551 Further, a duty to investigate the specific dangerousness of the conduct can be imposed in the case of activities that involve high abstract risk for life and health. If someone does not comply with this duty, then the risk will be regarded as foreseeable and there is clearly fault.

(i) Medical errors

7/552 As far as medical errors are concerned, the doctor is obligated to collect information as well as carry out investigations, surveys and observations in order to recognise a specific danger[154].

aa. Doctor's duty of care

7/553 According to the general doctrine, a person who must care for the life and health of people is obligated to exercise the greatest possible care that is necessary as a rule of experience in order to avoid the risk[155].

bb. Duty to ask

7/554 This leads to the doctor's duty to question the patient in a pertinent manner. If he breaches this duty, there is fault[156].

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152 *Shinomiya,* Fuhô kôi [Tort] 362; *Sawai,* Tekisutobukku jimu kanri, futô ritoku, fuhô kôi [Textbook on negotiorum gestio, unjust enrichment and tort][3] 176 f, 180 f; *Yoshimura,* Fuhô kôi [Tort][4] 73; *Shiomi,* Fuhô kôi-hô I [The law of tort I][2] 326 f.

153 Supreme Court of 20.12.1966, Keishû 20–10, 1212 (here in the context of a criminal case).

154 *Shinomiya,* Fuhô kôi [Tort] 360; *Shiomi,* Fuhô kôi-hô I [The law of tort I][2] 332 f.

155 Supreme Court of 16.2.1961, Minshû 15–2, 244.

156 Supreme Court of 16.2.1961, Minshû 15–2, 244.

aaa. Prerequisites

The assumption of such a duty to ask firstly requires the existence of a certain abstract danger. Furthermore, the questioning must represent an effective means of helping to avoid the danger. **7/555**

bbb. Effects

Accordingly, if the result would have been foreseeable had the doctor questioned appropriately but he did not, then if said result ensues it is assumed that the doctor has breached the duty of care and, thus, there was fault. **7/556**

cc. Stricter duty to question

This duty to question is even stricter in some cases. **7/557**

aaa. Basis for and scope of the duty

If, for instance, it is possible that an influenza vaccination may produce unusual side-effects which can lead to serious consequences (eg death and encephalitis) of the patient due to their physical constitution and predispositions, the doctor must fulfil the following duties in order to avoid this danger[157]. **7/558**

aaaa. Duty to make efforts to identify contraindications

The doctor is obligated to diligently carry out a careful preliminary examination as to whether the vaccination is necessary for the patient and, if applicable, to precisely identify contraindications. **7/559**

bbbb. Stricter duty to question

In this context, it is not sufficient for the doctor to ask general and abstract questions about any health issues; rather he is obligated to ask concrete questions insofar as such are necessary in order to identify contraindications[158]. If the relevant activity is carried out on a large scope, for example mass vaccinations, then it is difficult really to fulfil this duty in each and every case; insofar it is possible to speak of it being stricter. **7/560**

bbb. Consequences of breaching this duty

If this duty is breached, it is presumed that the responsible physician did not foresee the result due to negligence, although it would have been possible for him to foresee it[159]. **7/561**

157 Supreme Court of 30.9.1976, Minshû 30–8, 816.
158 Supreme Court of 30.9.1976, Minshû 30–8, 816.
159 Supreme Court of 30.9.1976, Minshû 30–8, 816.

(ii) **Environmental damage, damage from medication**

7/562 In the case of environmental damage and damage from medication, the courts have sometimes imposed on the relevant entrepreneur a duty to investigate and research as well as collect information, in order to be able to recognise a concrete danger[160].

aa. Environmental damage

aaa. Basis and scope of the duties

7/563 If, for example, it is not known in a chemical enterprise where chemistry knowledge is constantly being further developed and large quantities of chemical products are manufactured, which substances are generated as side-products in these processes, meaning that these may include toxins that are highly dangerous to humans and other life forms, the following duties are imposed upon the entrepreneur in order to avoid such dangers[161].

aaaa. Duty of the corporate management

7/564 The entrepreneur must usually manage the factories so that it is certain that no toxins can escape from the enterprise.

bbbb. Stricter duty to research

7/565 Furthermore, the enterprise must apply the most advanced technologies to carry out analyses when it wants to release sewage from the factories into rivers, etc and examine the sewage for toxins as well as the features and quantity of such and on this basis take completely secure measures to avoid endangering people and other life forms[162].

bbb. Consequences of breaching the duty

7/566 If an enterprise breaches the above duty to investigate, then the foreseeability of the result is presumed and on this basis a duty to avoid the result is imposed.

bb. Damage from medication

aaa. Basis and scope of the duty

7/567 If, for example, a pharmaceutical enterprise manufactures a medication that is directly ingested by the human body, there is a possibility that by taking the medicine a large number of people will be exposed to a high risk. In order to avoid this risk, the following duties are imposed upon pharmaceutical enterprises[163].

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160 *Shiomi,* Fuhô kôi-hô I [The law of tort I]² 330 f.
161 District Court Niigata of 29.9.1971, Ka-minshû 22–9/10 Bessatsu, 1.
162 District Court Niigata of 29.9.1971, Ka-minshû 22–9/10 Bessatsu, 1.
163 District Court Tokyo of 3.8.1978, Hanrei Jihô 899, 48.

aaaa. New medications

When it comes to a new medication, there is a duty to carry out in-vitro tests, animal testing and clinical studies in line with the highest technological standards before the medication is placed on the market. **7/568**

bbbb. Medications already on the market

In the case of medications that are already on the market, there is a duty to continue collecting literature and information. If these should give occasion for doubt as to side-effects, there is the duty to establish clarity as soon as possible as regards the existence and extent of these side-effects in relation to the relevant medicine, in that according to the seriousness of the doubts raised, for instance, animal testing is carried out or the medical records regarding the relevant medication are examined and follow-up investigations conducted. **7/569**

bbb. Consequences of breaching the duty

The above-cited duty corresponds to a duty to take all reasonable measures in order to foresee the risk; if the pharmaceutical company breaches this duty then the foreseeability of the result is assumed and thus also a duty to avoid the result[164]. **7/570**

c. Classification of the research duty

As shown above, when it comes to business operations with high abstract dangerousness, a duty to research is often assumed. However, there are two different views on how this duty is classified. **7/571**

(1) As a duty to foresee the damage

According to one view, this duty consists in undertaking all reasonable measures to be able to foresee the damage[165]. **7/572**

(i) **Foreseeability**

According to this view, foreseeability is assumed if the duty to research is breached. This means that the duty to investigate extends the number of cases in which it is possible to proceed on the basis that the damage was foreseeable. **7/573**

(ii) **Avoidability**

In a further step, it must be examined whether the foreseeable danger could have been avoided. **7/574**

164 District Court Tokyo of 3.8.1978, Hanrei Jihô 899, 48.

165 See eg District Court Niigata of 29.9.1971, Ka-minshû 22–9/10 Bessatsu, 1; District Court Tokyo of 3.8.1978, Hanrei Jihô 899, 48.

(2) As a duty to avoid the result

7/575 According to the other view, the breach of the duty to investigate means there was fault[166]. This can be reasoned as follows.

(i) Protection of the victim's rights

7/576 If there is a high risk of serious infringement of a right, then it can be assumed from the outset that there is a duty to avert it. This consists in the duty to investigate too.

(ii) Limitation of the injuring party's rights

7/577 If the necessary investigation is not carried out although it would have been possible, and if a right has been infringed, then the injuring party is liable.

C. Yardstick for fault

1. Method for assessing negligence

7/578 The very first question that arises in relation to the fault standard is how duties of conduct can be determined as prerequisite for negligence.

a. Learned-Hand formula

7/579 An influential view sees a method for this in the formula developed by *Learned Hand*[167].

(1) Yardstick for assessment

7/580 According to this, the weight of the infringed interests and the probability of the damage (A) occurring must be weighed up against the interests (B) impaired by the imposition of the conduct duty. If A outweighs B, then the duty of conduct must be recognised. This means that if these utilitarian considerations imported from US-American law are applied, the following two advantages can be weighed up against each other in order to assess fault.

166 This is particularly true in cases in which it would have been easy to avoid the result if it had only been foreseen. Supreme Court of 16.2.1961, Minshû 15–2, 244 is an example of such a case.

167 *Hirai,* Songai baishô-hô no riron [Theory of the law of damages] 402 f; *idem,* Saiken kakuron II Fuhô kôi [Law of obligations Particular part II Tort] 30.

(i) Benefit that the victim gains from the definition of a conduct duty

Firstly, there is the benefit that the victim would derive from the determination of the conduct duty (A). This consists of two elements. **7/581**

aa. Weight of the infringed interests

One element is the weight of the infringed interests. Into consideration must be taken: (1) life, bodily integrity, liberty, (2) property and other in rem rights, (3) claims, (4) other interests (eg light, air, view, reputation, private sphere). **7/582**

bb. Probability of the result occurring

The other element is the probability of the result ocurring. In this respect, for instance, (1) the dangerous act and (2) the generation, continuation, control or care of the source of danger must be taken into account. **7/583**

(ii) Value that is lost by determination of a conduct duty

Secondly, there is the matter of the value that would be lost (B) by establishing a conduct duty. In this respect, the following disadvantages must be considered. **7/584**

aa. Disadvantages for the injuring party

On the one hand, there are disadvantages for the injuring party (B1), consisting for example in the costs of avoidance. **7/585**

bb. Disadvantages for the victim

On the other hand, there may be disadvantages for the victim (B2), for instance the loss of interests that he could have gained from the activity of the injuring party must be taken into account (eg in the case of medical treatment or medication). **7/586**

cc. Disadvantages for society

Furthermore, the disadvantages for the general public (B3) must be taken into account; in this respect, the basis is the usefulness of the injuring party's activity for society (eg in the use of cars or pharmaceuticals or in preventing illnesses). **7/587**

(2) Problems

The *Hand formula* poses the following problems, however. **7/588**

(i) Lack of justification

Firstly, there is no clarification as to why these factors relevant under American law should also be taken into consideration when weighing up matters under Japanese law. **7/589**

(ii) **Problem issues when it comes to weighing up the benefits**

7/590 Secondly, weighing up the benefits using the *Hand formula* involves the following problems[168].

aa. Costs of avoidance

7/591 As this is solely a weighing up of costs, there is substantial risk that the protection of the victim's rights fade into the background.

bb. Social value

7/592 Furthermore, there is a considerable danger that businesses generating value for the general public will be prioritised over the rights of the victim. Unlike in the case of a preventive injunction, the victim is completely unprotected if no compensation is granted.

b. Methods for weighing up rights against each other

7/593 In order to assess whether there has been a tort, it is necessary to weigh up the victim's and the injuring party's rights against each other. The *Hand formula* can also be adapted into a method for such a balancing up of rights[169].

(1) Significance of the requirement of fault

7/594 The law of delicts serves to protect the rights of the victim against interference by the injuring party. However, if delictual liability is recognised in order to protect the victim's rights, this leads to a limitation of the injuring party's rights. In connection with the requirement of fault, the question arises as to whether it is justifiable to limit the injuring party's rights in order to protect the victim's rights and impose certain duties of conduct.

(2) Degree to which the injuring party's rights are limited

7/595 In this respect, the first question is how far the injuring party's rights are limited by the imposition of a duty of conduct.

(i) **Guidelines for weighing up the rights**

7/596 The more the injuring party's rights are restricted by imposing the duty of conduct, the weightier the grounds for such a limitation must be. This corresponds to element B1 in the *Hand formula.*

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168 *Awaji,* Kôgai baishô no hôri [Legal principles of liability for environmental damage] 99; *Shiomi,* Fuhô kôi-hô I [The law of tort I]² 36.

169 See *Yamamoto,* Kôjo ryôzoku-ron no sai-kôsei [Reconstruction of the theory of public order and public morals] 272 f. This is also argued by *Shiomi,* Fuhô kôi-hô I [The law of tort I]² 292 f.

(ii) **Significance of the principle of fault-based liability**

According to the fundamental principle of fault-based liability, foreseeability and avoidability are basic principles for imposing a duty to avoid the result. This can be classified as follows. **7/597**

aa. Foreseeability

If a duty to avoid the result is imposed even though such result was not foreseeable, this would be a heavy restriction on the injuring party's rights. **7/598**

bb. Avoidability

If, furthermore, the duty to avoid the result is imposed and it is assumed there was a breach of duty even though the result was not avoidable, this also leads to a heavy restriction on the rights of the injuring party. **7/599**

(3) Justification for the restriction of the injuring party's rights

There must be sufficient grounds to justify imposing an avoidance duty upon the injuring party although this restricts his rights. **7/600**

(i) **Necessity to protect the victim's rights**

If grave infringement of the victim's rights and a high probability of the rights infringement is at stake, then a corresponding restriction of the injuring party's rights is justified, insofar as the victim's rights can only be protected by recognising such an avoidance duty. This corresponds to element A in the *Hand formula*. In particular in relation to conduct with a high risk of grave infringements to life, bodily integrity or health, for instance in the case of environmental damage or damage from medication, imposing an avoidance duty upon the injuring party is justifiable even when avoidabilty and even foreseeability are low. **7/601**

(ii) **Advantages for the victim**

If the victim himself derives advantages from the injuring party's activities, for example in the case of damage from medication, the need to protect the rights of the victim is correspondingly lower. This corresponds to element B2 of the *Hand formula.* In this context, the extent of the advantages in comparison to the rights infringement must be evaluated. **7/602**

2. Yardstick with respect to the person

The second problem is what ought to be the yardstick for an individual when determining the conduct duty. **7/603**

a. Culpa in concreto and in abstracto (concrete and abstract fault)

7/604 There are two views in this respect.

(1) Acting party as yardstick – culpa in concreto (concrete fault)

7/605 According to one view, the abilities of the specific acting party must be taken as the standard[170]. Accordingly, there is fault if the respective acting party breaches the duty to act within the powers of his own abilities.

(2) Average person as yardstick – culpa in abstracto (abstract fault)

7/606 According to another view, the abilities of an average person are to be taken as the standard[171]. According to this, there is fault if the acting party breaches the duty to act as is required of an average person in the relevant social group. This in turn has two aspects.

(i) Imputation

7/607 Firstly, the excuse that one does not have the abilities of an average person is not admissible. In social life one is obliged to act at least with the level of abilities expected of the average person. This requirement leads to no excessive restriction of the injuring party's rights.

(ii) Exoneration

7/608 Secondly, the injuring party is not liable if he acted in the manner reasonably to be expected of the average person. If an action is required that goes beyond what can be demanded of an average person, then this would lead to excessive restriction of the injuring party's rights.

b. Types of culpa in abstracto (abstract fault) – using the example of medical liability

7/609 The question is what can be expected of an average person. As this depends on the specific features of the respective social group to which the acting party belongs, for example knowledge, profession, social position, place and experience, it is necessary to form categories[172].

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170 *Ishida,* Songai baishô-hô no sai-kôsei [Reconstruction of the law of damages] (1977) 11.

171 See eg *Wagatsuma,* Jimu kanri, futô ritoku, fuhô kôi [Negotiorum gestio, unjust enrichment and tort] 105 f; *Katô,* Fuhô kôi [Tort] 69 f; *Ikuyo/Tokumoto,* Fuhô kôi-hô [Law of tort] 40 ff; *Shinomiya,* Fuhô kôi [Tort] 337.

172 *Shinomiya,* Fuhô kôi [Tort] 337 f; *Hirai,* Saiken kakuron II Fuhô kôi [Law of obligations Particular part II Tort] 57 f; *Sawai,* Tekisutobukku jimu kanri, futô ritoku, fuhô kôi [Textbook on negotiorum gestio, unjust enrichment and tort][3] 184; *Shiomi,* Fuhô kôi-hô I [The law of tort I][2] 282 f.

(1) Yardstick for determining a duty – medical standard

A doctor, for example, is obligated to conduct appropriate medical treatment in line with medical standards. **7/610**

(i) Significance of medical standards

Medical standards mean those standards that apply in the practice of clinical medicine. **7/611**

aa. Difference to scientific standard

Thus, if treatment methods that are not yet widespread and tried-and-tested in clinical medicine are used, this is not necessarily a breach of a duty of conduct (fault)[173]. **7/612**

bb. Difference to actual practice

Neither is it material how an average doctor actually behaved; instead the yardstick is the standard with which he should comply[174]. **7/613**

(ii) Normative significance of medical standards

In practice this has the following significance. **7/614**

aa. Duty to investigate and duty of further education

A doctor may not invoke the excuse that he did not know something which is part of the medical standard. Therefore, a doctor is obligated to investigate what the medical standard is and to acquire the necessary knowledge. **7/615**

bb. Duty to refer patients on

If a doctor is not able to carry out a medical treatment in line with the medical standards, he must refer the patient to a suitable medical facility[175]. **7/616**

(2) Relativity of medical standards

(i) Individual abilities of the acting party

If the acting party coincidentally has knowledge and abilities that exceed the medical standard, this does not automatically mean stricter duties of conduct apply[176]. **7/617**

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173 Supreme Court of 30.3.1982, Hanrei Jihô 1039, 66; Supreme Court of 26.3.1985, Minshû 39–2, 124.

174 Supreme Court of 23.1.1996, Minshû 50–1, 1.

175 Cf Supreme Court of 26.3.1985, Minshû 39–2, 124 as well as Supreme Court of 11.11.2003, Minshû 57–10, 1387; Supreme Court of 8.12.2005, Hanrei Jihô 1923, 26 and Supreme Court of 3.4.2007, Hanrei Jihô 1969, 57.

176 Cf Supreme Court of 31.3.1988, Hanrei Jihô 1296, 46.

(ii) Standard that can be expected from the acting party

7/618 The medical standard is not uniformly established but is determined according to what it is reasonable to expect of the relevant medical establishment. Specifically, circumstances such as the type of medical establishment and local specifics of the medical treatment must be taken into account[177].

IV. Other defects in the damaging party's own sphere

A. Misconduct of persons

1. Rule for liability in respect of auxiliaries

7/619 The CC provides for the following rule on liability in respect of auxiliaries.

a. Liability of the principal

7/620 Whoever engages another to execute a certain business for him, is obligated to compensate for damage inflicted upon third parties by this other person in execution of that business (art 715 para 1 CC)[178].

b. Possibility for principal to be exonerated

7/621 In the following cases the principal may be exonerated (art 715 para 1 sent 2 CC).

(1) Due care in selecting and supervising

7/622 Firstly, when the principal has exercised appropriate care in selecting the auxiliaries and supervising them during the execution of the business.

177 Cf Supreme Court of 9.6.2005, Minshû 49–6, 1499.

178 Art 715 para 1 CC states: »A person who employs others for a certain business shall be liable for damage inflicted on a third party by his/her employees with respect to the execution of that business; provided, however, that this shall not apply if the employer exercised reasonable care in appointing the employee or in supervising the business, or if the damage could not have been avoided even if he/she had exercised reasonable care«.

(2) No causation

Secondly, if the damage would also have occurred had reasonable care been applied. **7/623**

2. Nature of liability for auxiliaries

There is controversy as to the rationale for the liability of the principal[179]. **7/624**

a. Legislative process

In the process of elaborating the CC, the rule on liability for auxiliaries passed through the following changes[180]. **7/625**

(1) Old CC

In the old CC (art 373 on Property Law) the liability for auxiliaries was understood as follows. **7/626**

(i) Liability of the principal for his own behaviour

The reason for the principal's liability was because he was negligent in selecting or supervising the auxiliaries according to this provision. **7/627**

(ii) No exculpatory grounds

However, the principal's negligence was presumed. Besides this, there was no provision that allowed for rebuttal of this presumption by proving that there was in fact no negligence. **7/628**

(iii) Tort by the auxiliaries

As the liability of the principal is vicarious for the auxiliaries, it was a prerequisite that there have been a tort by the auxiliary. **7/629**

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179 See *Morishima,* Fuhô kôi-hô kôgi [Textbook on the law of tort] 22 f; *Sawai,* Tekisutobukku jimu kanri, futô ritoku, fuhô kôi [Textbook on negotiorum gestio, unjust enrichment and tort][3] 291 f; *Yoshimura,* Fuhô kôi [Tort][4] 202 f. In detail, further *Tanoue,* Shiyô-sha sekinin [Liability for auxiliaries], in: Hoshino et al (eds), Minpô kôza dai-6-kann [Textbook civil law vol 6] (1985) 459; Ôtsuka, Minpô 715-jô, 717-jô (Shiyô-sha sekinin, Kôsaku-butsu sekinin) [Arts 715, 717 CC (Liability for auxiliaries, liability of the possessor of a building)], in: Hironaka/Hoshino et al (eds), Minpô-ten no hyakunen III [100 years of the Civil Code III] 673.

180 *Tanoue,* Shiyô-sha sekinin [Liability for auxiliaries], in: Hoshino et al (eds), Minpô kôza dai-6-kan [Textbook on civil law vol 6] 460 f; *Ôtsuka,* Minpô 715-jô, 717-jô (Shiyô-sha sekinin, Kôsaku-butsu sekinin) [Arts 715, 717 CC (Liability for auxiliaries, liability of the possessor of a building)], in: Hironaka/Hoshino et al (eds), Minpô-ten no hyakunen III [100 years of the Civil Code III] 674 f.

(2) Applicable CC

7/630 The authors of today's CC, on the other hand, understood liability for auxiliaries as follows.

(i) Liability of the principal for his own behaviour

7/631 The reason for the principal's liability, according to this view, was that the principal himself was negligent when selecting and supervising the auxiliaries.

(ii) Introduction of a provision on exculpatory grounds for the principal

7/632 Unlike the old CC, today's CC expressly releases the principal from liability if he exercised appropriate care not only in selecting the auxiliaries but also in supervising them. If the principal was always made liable for the conduct of auxiliaries, it would no longer be possible nowadays, when one so often engages other people, to contract for something without undue worry.

(iii) Tort by the auxiliary

7/633 It remained open whether a tort by the auxiliary himself is a prerequisite.

b. Liability for the tort of the auxiliary

7/634 Subsequently, the view prevailed that when it comes to liability for auxiliaries, the principal is liable to the victim for the tort of the *auxiliaries*[181]. This means that liability for auxiliaries is understood as liability for tort by another person. Besides the principal's liability, however, the auxiliaries' own liability for their tort also continues to exist.

(1) Tort by an auxiliary

7/635 According to this view, it is necessary that the auxiliary's act in itself fulfils all the prerequisites for a tort (infringement of a right, intention and/or negligence, damage).

(2) Liability of the principal for the tort of the auxiliary

(i) Grounds

7/636 This heavier burden in comparison to art 709 for the principal is justified as follows[182].

181 *Wagatsuma,* Jimu kanri, futô ritoku, fuhô kôi [Negotiorum gestio, unjust enrichment and tort] 161 f; *Katô,* Fuhô kôi [Tort] 165; *Maeda,* Minpô IV-2 (Fuhô kôi-hô) [Civil law IV-2 (Law of torts)] 141. See further also *Shinomiya,* Fuhô kôi [Tort] 682.

182 *Maeda,* Minpô IV-2 (Fuhô kôi-hô) [Civil law IV-2 (Law of torts)] 141; *Shinomiya,* Fuhô kôi [Tort] 680 f; *Sawai,* Tekisutobukku jimu kanri, futô ritoku, fuhô kôi [Textbook on negotiorum gestio, unjust enrichment and tort][3] 299 f. *Wagatsuma,* Jimu kanri, futô ritoku, fuhô kôi [Negotiorum

aa. Liability due to obtaining a benefit

As the principal draws a benefit from using auxiliaries to perform an activity, he must also be liable for torts arising in this context. **7/637**

bb. Liability for creating a risk

As the principal has created or increased a risk by using auxiliaries, he is liable for the manifestation of the risk due to the auxiliaries. However, there is no need to examine whether in the specific case any risk was created or increased. **7/638**

(ii) Significance of the rule exculpating the principal from liability

According to this, the exculpation of the principal has nothing to do with fault in the sense of art 709 CC but instead is based on policy considerations. Due to the principles of liability on the basis of deriving a benefit and of liability for dangerous activity, however, as far as possible no exculpation from liability should be recognised in the case of absence of fault with respect to selecting or supervising the auxiliaries, so that in effect there is non fault based liability[183]. **7/639**

(3) Criticism

With respect to the understanding of liability for auxiliaries as liability in lieu of the auxiliaries, meaning it is a prerequisite that there have been a tort by said auxiliaries, the following problematic issues have been highlighted[184]. **7/640**

(i) Problems with respect to the protection of the victim

aa. Difficulties with identifying the auxiliary and proof of fault

If damage arises within a corporate operation, it is hard for victims outside of the enterprise to determine which specific auxiliary within the company committed the damaging act and to prove the fault of said auxiliary. **7/641**

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gestio, unjust enrichment and tort] 162 and *Katô,* Fuhô kôi [Tort] 165 only cite liability based on gaining a benefit.

183 *Wagatsuma,* Jimu kanri, futô ritoku, fuhô kôi [Negotiorum gestio, unjust enrichment and tort] 163 f already stated this explicitly.

184 *Tanoue,* Shiyô-sha sekinin [Liability for auxiliaries], in: Hoshino et al (eds), Minpô kôza dai-6-kann [Textbook on civil law vol 6] 502; *Morishima,* Fuhô kôi-hô kôgi [Textbook on the law of tort] 25 f.

bb. Problem of exculpation from liability in the case of someone who has no capacity to commit a delict

7/642 If, moreover, the auxiliary is incapable of committing a delict, it would contradict the principles of liability due to deriving a benefit or liability due to increased danger if the principal were always to be exculpated from liability in such a case.

(ii) **Danger of excessive liability of the auxiliary**

7/643 In case law there is a tendency to set the duties of conduct for auxiliaries very high in order to make it more likely that the principal be held liable. However, there is no justification for imposing stricter duties of conduct on the auxiliary, who merely carries out the instructions of the principal, than on other people.

c. Liability for one's own conduct – liability for own tort

7/644 In order to resolve this problem, the following approaches have been developed.

(1) Direct liability

7/645 It is argued that art 715 CC provides for direct liability of the principal for the auxiliaries[185].

(i) **Liability of the principal**

7/646 This is based on the idea that if liability for auxiliaries is based on the fundamental concepts of deriving an advantage and creating a danger, the actual object of the liability is not the auxiliary but the principal.

(ii) **Tort by the auxiliary**

aa. Fault of the auxiliary

7/647 According to this view, not only is the auxiliary free from liability but neither is it required that he acted culpably – negligently or intentionally.

bb. Wrongfulness of the action inflicting damage

7/648 According to this, it is sufficient that the auxiliary's damaging action is objectively wrongful.

(2) Liability of the entrepreneur

7/649 Furthermore, it is argued that there has also been a tort on the part of the entrepreneur himself and therefore, that the entrepreneur is liable directly for the auxiliary under art 709[186].

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185 *Tanoue,* Hiyô-sha no yûseki-sei to minpô 715-jô (1), (2) [Fault of the auxiliary and art 715 CC (1), (2)], Kagoshima Daigaku Hôgaku Ronshû 8–2 (1973) 59; 9–2 (1974) 51.

186 *Kanda,* Fuhô kôi sekinin no kenkyû [Investigation on delictual liability] (1988) 38 f, 56; *Morishima,* Fuhô kôi-hô kôgi [Textbook on the law of tort] 33 f. The District Court Kumamoto

(i) Principles of liability of the entrepreneur

This can be justified as follows. **7/650**

aa. View from outside

If damage arises in the course of the ordinary operation of a business, then the question of who was involved in the tort is simply an internal matter for the company; for the victim outside the company, however, the company itself appears as the damaging party. **7/651**

bb. Entrepreneur's duty of conduct

Further, it is possible to recognise corresponding duties of conduct for the entrepreneur, ie operational, organisational duties[187]. **7/652**

(ii) Parallel applicability of enterprise liability and liability for auxiliaries

According to this, liability for auxiliaries may be understood as liability in the stead of the auxiliary and enterprise liability may be imposed separately[188]. **7/653**

B. Defective things

1. Liability of the possessor of a building

a. Significance

If another person suffers damage due to defects in the construction or maintenance of a building, the following liability rules apply. **7/654**

(1) Primary liability of the possessor

Firstly, insofar as there is a possessor of the building, such is liable to compensate the damage (art 717 para 1 sent 1 CC). **7/655**

(2) Subsidiary liability of the owner

Secondly, the owner of the building is liable to compensate the damage if there is no possessor or if the possessor exercised the necessary care to avoid the damage (art 717 para 1 sent 2 CC). **7/656**

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of 20.3.1973, Hanrei Jihô 696, 15 and the District Court Fukuoka of 4.10.1977, Hanrei Jihô 866, 21 take the same considerations as their basis.

187 *Shiomi,* Fuhô kôi-hô I [The law of tort I][2] 309 f.

188 See *Kanda,* Fuhô kôi sekinin no kenkyû [Investigation on delictual liability] 46 f as well as *Sawai,* Tekisutobukku jimu kanri, futô ritoku, fuhô kôi [Textbook on negotiorum gestio, unjust enrichment and tort][3] 297, 315 f; *Yoshimura,* Fuhô kôi [Tort][4] 206 f; *Shiomi,* Fuhô kôi-hô I [The law of tort I][2] 312 f.

b. Purpose

(1) Nature of liability

7/657 The liability for buildings features the following specifics.

(i) Liability of the possessor

7/658 The liability of the possessor is an interim type between fault based and non-fault based liability.

aa. Basis for liability – fault-based liability

7/659 The possessor's liability is based on the assumption that there was a defect regarding the construction or maintenance of the building in his possession and that the possessor of this building did not take the necessary measures in order to avoid the damage.

bb. Reversal of burden of proof

7/660 Unlike under art 709 CC, the possessor can only exculpate himself from liability by proving that he took the necessary measures to avoid the damage.

(ii) Liability of the owner

7/661 No such exculpatory grounds are provided for, however, for the owner. He is liable due to the defect in the construction or maintenance of the building regardless of the cause of the defect, the point in time the defect arose or whether countermeasures were taken or not.

(2) Basis for making the liability stricter – principle of strict liability based on dangerousness

7/662 This takes as a premise the idea that the party who controls and administers a defective and thus dangerous building must bear the damage that results from this danger manifesting[189].

(i) Liability of the possessor

7/663 The possessor of the building not only has the duty to take the necessary measures to avoid the damage but also bears the burden of having to justify his own conduct, ie the burden of proof that there was no fault involved.

189 *Shinomiya,* Fuhô kôi [Tort] 730. *Sawai,* Tekisutobukku jimu kanri, futô ritoku, fuhô kôi [Testbook on negotiorum gestio, unjust enrichment and tort][3] 320, also sees elements of liability for obtaining the benefit.

(ii) Liability of the owner

As owner of the dangerous building, the owner has the duty to compensate the damage that another has sustained due to this danger. 7/664

2. Product liability

a. Significance

Product liability is the liability of producers and other people to compensate damage that is caused to someone else – this may be the purchaser or another party – by a defect in the product injuring their life, bodily integrity or assets (arts 1 and 3 Product Liability Act)[190]. The Product Liability Act was promulgated in 1994 as a special law to govern product liability. 7/665

b. Special features

In comparison to the general law of delicts, the Product Liability Act displays the following special features. 7/666

(1) From fault-based liability to liability for a defect

The producer is liable regardless of fault if someone else has sustained damage due to a defect in the product. 7/667

(i) Relief in the case of evidentiary problems with respect to fault

While it is usually extremely difficult to prove whether fault has occurred during a complicated production process, proving a defect in the product is relatively easy. This means that the legal means for relief available to the victim is more easily enforceable. 7/668

(ii) Victim's burden of proof

Nonetheless, pursuant to the general basic rules, the victim not only has the burden of proof in relation to the defect in the product but also for causation. 7/669

(2) Exculpatory grounds for the producer

The producer can only free himself from liability by proving that due to the current state of science and technology at the time of handover the defect could not be discovered. This is based on the – heavily criticised – consideration that the following difficulties would arise if this defence was not allowed. 7/670

190 *Seizô-butsu sekinin-hô,* Law no 85/1994.

(i) Consumers' interests

7/671 Firstly, there would be a risk that producers be hesitant to deliver new, especially dangerous products and consumers would no longer gain the benefits, for instance, of new medications promptly.

(ii) Producers' interests

7/672 Furthermore, there would be a risk that producers lose interest in developing new products.

V. Dangerousness

A. Significance of strict liability for dangerousness

7/673 Liability based on dangerousness means that when an accident is brought about due to a socially necessary source of danger, the keeper of the source of danger is liable regardless of whether there is fault. No caps by maximum amounts are provided for in the individual special laws.

1. Necessity for liability based on dangerousness

7/674 The necessity for non fault based liability is argued as follows.

a. Social necessity of the source of danger

7/675 Firstly, this concerns cases in which it is not possible to forbid the dangerous activity or possession of the dangerous thing as the activity or thing is essential to society despite the danger involved.

b. Accident without fault

7/676 Furthermore, it is often the case that accidents due to the dangerous activity or thing cannot be avoided even when the keeper of the source of danger acts with due care. If fault-based liability was the starting point here, then those whose rights are infringed would be completely unprotected.

2. Principles of imputation in respect of non fault based liability

7/677 The following two principles are generally cited as the foundation for such non fault based liability.

a. Principle of liability for a danger

Firstly, it is possible that the controllability of the source of danger be drawn on as the basis for imputation. The underlying idea is that the person who controls the dangerous activity or thing is liable for the resulting damage. **7/678**

b. Principle of liability on the basis of drawing a benefit

Secondly, imputation can be reasoned on the basis of benefits being derived from the source of danger. The underlying concept is that the person who is allowed to carry out the dangerous activity or possess the dangerous thing and thus derives a benefit, is liable for the resulting damage. **7/679**

B. Statutory rules providing for strict liability based on dangerousness

Such liability based on dangerousness is provided for in various special laws in Japan, the analogous application of which is rejected. At present there is no talk of a general rule. Examples: **7/680**

		Activities/ things included	Object of compensation	Liable party	Type of liability
Art 3 Automobile Liability Security Act *(Jidôsha-Songaibaishô-Hoschô,hô,* Law no 97/1955)	1955	Operation of a motor vehicle (not also a railway)	Life, bodily injury	Keeper of motor vehicle	Interim form: reversal of burden of proof with respect to fault
Art 109 Mining Act *(Kôgyô-hô,* Law no 289/1950 as amended by Law no 84/2011)	1950	Excavation of land to mine minerals, draining of mine water and sewage; depositing stones and slag; emission of smoke generated during smelting	No limit	Holder of the mining rights for the mining area	Non fault based liability

Art 25 Air Pollution Control Act *(Daiki osen boshi-hô,* Law no 97/1968 as amended by Law no 60/2013)	1968	Emission into the air of substances harmful to health, which are created during the business operation in factories and enterprises	Life, bodily injury	Entrepreneur	Non fault based liability
Art 19 Act on Prevention of Water Pollution *(Suishitsu odaku boshi-hô,* Law no 138/1970 as amended by Law no 60/2013)	1970	Draining of untreated waste water and sewage containing harmful substances, which are produced during business operations in a factory or an enterprise, as well as the seeping into the ground of such	Life, bodily injury	Entrepreneur	Non fault based liability
Art 3 Act regarding the payment of compensation for damage that has arisen in connection with the generation of nuclear power *(Genshi-ryoku songai baishô-hô,* Law no 147/1988 as amended by Law no 47/2012)	1960	Operation of a nuclear reactor	Damage that arises in connection with the generation of nuclear power (not limited to personal injury)	Operator of nuclear power plant	Non fault based liability – freedom from liability only in the case of extraordinarily major natural disasters and social unrest

Part 7 Limitations of liability

I. Limitation as regards causation

As explained above in Chapter 5 II. A. (no 7/289), the concept of causality and its delimitations are controversial. **7/681**

A. Adequacy theory

According to the traditionally dominant theory[191] and case law[192], it is a prerequisite for delictual liability that there be an adequate causal link between the damaging act and the result. **7/682**

1. Definition of adequate causation

a. Concept

Adequate causation means that the damage would not have arisen without the damaging act and that it is a usual consequence of such an act[193]. **7/683**

b. Purpose

The underlying idea is that only the legally relevant part of a potentially, infinite chain of causation ought to be taken into consideration. Since besides this, no legal causation is assumed, the area imputable to the damaging party is limited to a reasonable extent. **7/684**

191 *Wagatsuma,* Jimu kanri, futô ritoku, fuhô kôi [Negotiorum gestio, unjust enrichment and tort] 154 f; *Katô,* Fuhô kôi [Tort] 152 f.

192 Imperial Court of 22.5.1926, Minshû 5, 386.

193 *Wagatsuma,* Jimu kanri, futô ritoku, fuhô kôi [Negotiorum gestio, unjust enrichment and tort] 154 f.

2. Analoguous application of art 416 CC

a. Interpretation of art 416 CC

(1) Ordinary damage

7/685 It is generally considered that art 416 para 1 CC sets out the principle of adequate causation. According to this provision, the damage that would usually arise due to failure to perform an obligation, ie that is connected by an adequate causal link to such failure, must be compensated.

(2) Special damage

7/686 Article 416 para 2 CC further stipulates which circumstances are to be taken into account when assessing whether there was adequate causation. According to this, even special circumstances that the parties foresaw or could have foreseen must be taken into account when assessing whether there is an adequate causal link with the failure to perform the obligation.

b. Analogous application to torts

7/687 It is argued that art 416 CC contains general principles of tort and thus, naturally, is not only applicable to failure to perform obligations but also by analogy to torts[194].

3. Problems with the adequacy theory

7/688 However, the following criticisms are made in relation to the adequacy theory.

a. Applicability in Japan

7/689 The critics point out that the adequacy theory originates from German law and, therefore, that it is not appropriate in Japanese law since this is based on different prerequisites[195].

(1) German law

7/690 German law takes the principle of full compensation as its premise, according to which the entire damage that is causally connected with the failure to perform must be compensated if the prerequisites for a compensation claim have been met. The adequacy theory serves to limit the liability to a reasonable scope.

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194 Imperial Court of 22.5.1926, Minshû 5, 386.

195 *Hirai,* Songai baishô-hô no riron [Theory of the law of damages] 90 ff; *idem,* Saiken kakuron II Fuhô kôi [Law of obligations Particular Part II Tort] 81 f, 109 f.

(2) Japanese law

(i) Differences with respect to the principles of compensation

Article 416 CC, on the other hand, is based on the reception of English law, namely the rule established in *Hadley v Baxendale* and thus it follows the principle of restrictive compensation. According to this, the damage that would ordinarily arise must be compensated, but not damage that arose due to special circumstances, insofar as such were not foreseeable. This means, however, precisely that there are cases in which damage is not recoverable although it is causally linked with the failure to perform an obligation, ie that the scope of the recoverable damage is limited from the outset. Consequently, the prerequisites for applying the adequacy theory are missing from Japanese law. **7/691**

(ii) Prerequisites of art 416 CC – breach of contract

The purpose of art 416 CC lies further in granting a party compensation for the impairment of his interests that ought to have been furthered by the contract, this having been frustrated by the failure to perform. This is not the case with respect to torts. **7/692**

b. Unclear yardstick

The second point of criticism is that the yardstick for adequate causation is unclear. **7/693**

(1) Lack of clarity

Firstly, there is no way to clearly state what an adequate causal link constitutes. Therefore, the result is frequently merely described using other words. **7/694**

(2) Manifold assessment factors

In reality, assessing whether causation is adequate involves a whole range of different aspects. While the term »adequate causation« is always spoken of, in fact very diverse factors are decisive. **7/695**

B. Three-step approach

Nowadays, an approach that seeks to examine the issues related to adequate causation, which were hitherto examined together, separately in three steps[196] is influential. **7/696**

196 Cf *Hirai,* Songai baishô-hô no riron [Theory of the law of damages] 135 f; *idem,* Saiken kakuron II Fuhô kôi [Law of obligatons Particular part II Tort] 110 as well as *Maeda,* Minpô IV-2 (Fuhô kôi-hô) [Civil law IV-2 (Law of torts)] 126; *Ikuyo/Tokumoto,* Fuhô kôi-hô [Law of tort] 116 ff; *Shinomiya,* Fuhô kôi [Tort] 407; *Shiomi,* Fuhô kôi-hô I [The law of tort I]³ 362 f, 386 f.

1. Factual causation

7/697 As the first step, thus, the existence of a factual connection must be examined, ie whether the damaging act actually caused the material result.

2. Protective scope

7/698 In a second step, there is a legal evaluation of how far the result that is factually linked in terms of causation can be imputed to the damaging party.

3. Assessment of damage

7/699 In the third step, the question is how the damage that falls within the protective scope can be measured in monetary terms.

II. Yardstick to determine the protective scope

7/700 There is debate on which yardstick should be used to determine the protective scope. In this respect, the following two opinions are variously supported; they differ as to whether they distinguish between the primary and consequential harm.

A. Uniform yardstick

7/701 The traditional understanding is that no distinction is made between the primary harm and consequential harm; instead the protective scope is determined according to a uniform yardstick.

1. Adequacy theory

7/702 According to the traditionally dominant theory and case law outlined above, the protective scope is determined on the basis of adequacy. Nonetheless, it has already been pointed out that this yardstick is not sufficiently clear and definite.

2. Protective purpose of the duty

a. Significance

7/703 By contrast, it is also argued that the damaging party is liable for all harm within the area to which the conduct duties he infringed related. Thus, the question of

whether there is liability depends on whether the infringement of the right falls within the protective purpose of the conduct rule violated by the damaging party.

b. Yardstick for assessment

According to this approach, liability or not is determined based on the following elements. **7/704**

(1) Occurrence of the result

Firstly, it is a prerequisite that occurrence of the result (infringement of a right or damage) is established. **7/705**

(2) Factual causation

Furthermore, there must be a factual causal link between the result and the damaging party's act. **7/706**

(3) Establishing a duty of conduct

Beyond this, it must be determined whether the damaging party has a duty to prevent the result occurring. As described above in Part 6 II., this must be examined using the *Learned-Hand formula*. This means that (A), the weight of the interests infringed and the probability of the result occurring, must be weighed up against (B), the interests that would be sacrificed by imposing the conduct duty, with a conduct duty being assumed if A outweighs B. **7/707**

(4) Assessment of the protective purpose of the duty

If it is concluded that the damaging party has such a duty, then it must be determined whether the infringement of the right or the damage lies within the protective scope of the damaging party's duty of conduct. **7/708**

B. Distinction between primary and consequential harm

On the other hand, there is also an influential opinion to the effect that a distinction must be drawn between the primary and consequential harm and that this means imputability to the damaging party must be examined in a twofold manner[197]. **7/709**

197 See on this, eg, *Maeda,* Minpô IV-2 (Fuhô kôi-hô) [Civil law IV-2 (Law of torts)] 130 ff, 302 ff; *Shinomiya,* Fuhô kôi [Tort] 431 f, 449 f; *Shiomi,* Fuhô kôi-hô [Law of tort] 178 f; *idem,* Fuhô kôi-hô I [The law of tort I]² 390 f, which, however, do differ in the nuances respectively.

1. Primary harm – protective purpose of the duty

7/710 According to this view, the question of whether the primary harm falls within the relevant protective scope must be answered based on the extent of the purpose ascribed to the rule giving rise to the duty. This is in line with the assessment of fault in the objective sense.

2. Consequential harm – connection with wrongfulness

7/711 On the other hand, the question of whether the consequential harm falls within the protective scope must be examined in the context of the wrongfulness aspect.

a. Concept behind the wrongfulness aspect

7/712 The idea behind the wrongfulness aspect is that when the especial danger triggered by the primary harm manifests, the damaging party responsible for the primary harm is also liable for this consequential result.

b. Underlying ideas

7/713 This is based on the following considerations.

(1) General risk of life – casus sentit dominum

7/714 In principle, it is the rule that the owner of the right (victim) must himself bear the risks of everyday life.

(2) Especial dangers

7/715 If the damaging party, however, has created a danger exceeding that of the general risks of life due to the primary harm brought about by his intention or negligence, then he is also liable for the consequences of this danger being realised. This is significant in the following sense.

(i) Requirement of intention or negligence

7/716 If the damaging party committed the primary harm intentionally or negligently, then he is liable for the consequential harm even if there is no intention or negligence in this respect.

(ii) Limitation to the realisation of an especial danger

7/717 However, if the result is not due to the realisation of a special danger created by the primary harm, then such must be seen in itself as primary harm so that once again intention and negligence must be determined.

III. Types of consequential harm

In the following, some specific problems connected with consequential harm will be examined. 7/718

A. Consequential harm and the same victim

One group of cases consists of consequential harm in relation to the same victim that suffered the first damage. Within this group, two sup-groups can be distinguished, depending on who causes the consequential harm. 7/719

1. Damage inflicted by a third party

The first sub-group are cases in which the consequential damage is brought about by a third party, other than the damaging party that caused the primary harm. This is the case, for instance, when the victim suffers bodily injury due to a traffic accident caused by the first damaging party and then dies due to medical malpractice by the treating physician (second damaging party). 7/720

a. Uniformity theory

(1) Adequacy theory

According to the adequacy theory, the first question is whether each of the damaging parties created a legally adequate condition for the ultimate result to occur, namely the death of the victim. It is material in this respect whether each of the acts by itself made the occurrence of the result appear highly probable[198]. 7/721

(2) Protective purpose of the duty

According to the view that takes the protective purpose of the duty as its premise, the issue is whether the first damaging party was also under a duty to avoid the result that the victim would be brought to a medical facility as a result of the traffic accident and die as a result of medical error there. According to the *Learned-Hand formula,* a crucial element is assessing whether the probability of the result happening (death of the victim) is particularly high as a result of the first damaging party's act, ie liability in such case hinges on which medical treatment is necessitated by such a traffic accident and how high the resulting probability is that the victim die. 7/722

198 Supreme Court of 13.3.2001, Minshû 55–2, 328.

b. Distinction between primary and consequential harm – wrongfulness aspect

7/723 According to the doctrine of the wrongfulness connection, on the other hand, the only issue in relation to the consequential harm is whether a special danger brought about by the primary harm has manifested; by contrast, the presence of intention or negligence is not material in relation to the consequential harm[199].

(1) Creation of a special danger

7/724 The primary harm (bodily injury to the victim) brought about by the first damaging party created a special danger, namely that of a medical intervention, ie an act that is per se dangerous as it represents interference with the body.

(2) Realisation of the special danger

(i) Basic rule

7/725 The injury due to the medical error realises a danger inherent to medical treatment. Therefore, the consequential harm, namely the death of the victim, can also be imputed to the first damaging party.

(ii) Exception

7/726 However, if the consequential harm as a result of the medical error is due to intention or gross negligence on the part of the second damaging party, this does not constitute the realisation of the special danger created by the first damaging party. Hence, the consequential harm, ie the death of the victim, cannot be imputed to the first damaging party in this case.

2. Damage inflicted by victim himself

7/727 The second group consists of cases in which the consequential harm is brought about by the conduct of the victim himself or otherwise by something falling within his sphere of responsibility, for instance in that he inflicts a bodily injury or other harm upon himself. A further example: the victim remains disabled as a result of the traffic accident caused by the damaging party and consequently falls ill with depression, ultimately leading to his suicide.

199 *Shinomiya,* Fuhô kôi [Tort] 450 ff.

a. Uniformity theory

(1) Adequacy theory

7/728 According to the adequacy theory, the question is whether the conduct of the damaging party represents a legally relevant condition for the result to occur, this being the death of the victim. The material issue in respect of adequacy is the degree of probability that someone who (1) without any contributory fault is injured in an accident, consequently (2) falls ill with accident neurosis, which develops into (3) a depression and ultimately leads to (4) suicide[200].

(2) Protective purpose of the duty

7/729 According to the view that takes the extent of the duty as its premise, the question is whether it is also possible to impose upon the damaging party a duty to avoid the results that the victim falls ill with depression due to the traffic accident and commits suicide. According to the *Hand formula,* the really material factor is whether the probability of the relevant result occurring, ie the victim dying, is particularly high due to the damaging party's act. This corresponds to the above-numbered factors (1) to (4).

b. Distinction between primary and consequential harm – wrongfulness aspect

7/730 According to the Germanic law theory of the connection with wrongfulness *(Lehre vom Rechtwidrigkeitszusammenhang),* on the other hand, it is sufficient that the primary harm was culpable and the only remaining question is whether the special danger created by the first damaging party was realised[201].

(1) Creation of a special danger

7/731 The act of the damaging party, ie the mistake made by such when driving his vehicle which injured the victim, gave rise to a special danger that the victim would suffer from accident neurosis due to his disability.

(2) Realisation of the special danger

7/732 Furthermore, the issue is whether the victim's suicide represents a realisation of the special danger of the victim falling ill with accident neurosis due to the disability. In this respect too, it is ultimately the above-numbered factors (1) to (4) that are material.

200 Supreme Court of 9.9.1993, Hanrei Jihô 1477, 42.
201 *Shinomiya,* Fuhô kôi [Tort] 450 f, 455 f.

B. Consequential harm in relation to another – indirect victim

7/733 It is also conceivable, however, that someone other than the victim of the primary harm is affected by the consequential harm. In this case, the question is whether when a third party suffers consequential harm resulting from the first damage that the direct victim suffers due to the damaging party, this third party (the indirect victim) can seek compensation from the damaging party[202]. In this context, two types of case must be distinguished.

1. Damage inflicted upon near relatives

7/734 The first cases are those in which the relevant third party is a close relative of the victim. Within this context, two sub-groups must be distinguished.

a. Takeover of the damage

7/735 Firstly, it is conceivable that a third party bears the loss the victim sustained and indemnifies the victim. This happens, for example, when close relatives (eg guardians) pay the medical costs for the victim.

(1) Victim's compensation claim

7/736 In this case, the damage sustained is the medical treatment costs that the victim normally would have had to pay except that a close relative has taken them on for him. This means that the direct victim has a claim for compensation against the damaging party[203].

(2) Close relative's claim for compensation

7/737 In general, a close relative who has paid in lieu of the victim will be granted a claim for compensation against the damaging party[204]. Nevertheless, the rationale for this claim is problematic.

(i) Extent of the compensation

7/738 The earlier prevailing theory proceeded on the basis that the damaging party had committed a tort against the victim and took as its premise whether the loss sustained by the close relative fell within the scope of the recoverable damage. According to the adequacy theory, the crux is whether it might be expected that due

202 *Shinomiya,* Fuhô kôi [Tort] 493 f; *Shiomi,* Fuhô kôi-hô [Law of tort] 182 f; *idem,* Fuhô kôi-hô I [The law of tort I][2] 392 f.
203 Supreme Court of 20.6.1957, Minshû 11–6, 1093.
204 Imperial Court of 12.2.1937, Minshû 16, 46.

to the damaging act by the tortfeasor, a close relative would take over the treatment costs.

(ii) **Subrogation of the party paying compensation**

Nowadays, there is a lot of support for the view that the victim has a compensation claim against the damaging party and a close relative, who has indemnified the victim for the costs, can exercise this compensation claim in analogous application of art 422 CC[205] in lieu of the victim[206]. **7/739**

b. Own damage

Furthermore, the infringement of the direct victim's rights may lead to the close relative himself suffering damage. This is the case, for instance, when a close relative returns from abroad to care for the victim. **7/740**

(1) Uniformity theory

(i) **Adequacy theory**

According to the adequacy theory, the question is whether the occurrence of the result (return of the close relative from abroad to care for the victim) is adequate given the act of the damaging party or the injury to the victim (bodily injury to the victim due to the damaging party's mistake when driving) from a general perspective[207]. **7/741**

(ii) **Protective purpose of the duty**

According to the view that takes the protective purpose of the duty as its premise, it must be analysed whether the damaging party ought to have foreseen the damage to the close relative and thus, whether he was under a duty to avoid such damage[208]. **7/742**

(2) Distinction between primary harm and consequential harm – wrongfulness aspect

According to the theory of wrongfulness, on the other hand, the question is whether the impairment suffered by the close relative represents the realisation of an especial danger created by the first injury to the victim[209]. **7/743**

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205 Art 422 CC stipulates: »If an obligee receives the full value of any thing or right which is the subject of the claim as the compensation for damage, the obligor shall be subrogated to the creditor in relation to such property or right by operation of law«.

206 *Shinomiya,* Fuhô kôi [Tort] 497; *Hirai,* Saiken kakuron II Fuhô kôi [Law of obligations Particular part II Tort] 184 f; *Shiomi,* Fuhô kôi-hô [Law of tort] 183.

207 Supreme Court of 25.4.1974, Minshû 28–3, 447.

208 *Hirai,* Saiken kakuron II Fuhô kôi [Law of obligations Particular part II Tort] 185 f.

209 *Shiomi,* Fuhô kôi-hô [Law of tort] 184.

(i) **Creation of a special danger**

7/744 An especial danger was created by the damaging party's act (bodily injury to the victim due to the damaging party's mistake when driving), specifically that the victim now needs care.

(ii) **Realisation of the special danger**

7/745 The question is whether the fact that the close relative's return from abroad to care for the victim became inevitable, ie represents a realisation of the relevant especial danger, namely that the victim requires such care. If this can be assumed, then the damaging party is liable to the relative for compensation regardless of whether he was at fault in relation to such.

2. Damage sustained by an entrepreneur

7/746 The second case of consequential harm is when the employer's claim to work performance from the employee is frustrated. This is the case, for instance, when the employee is injured by the damaging party in a traffic accident and consequently cannot perform his work, meaning his employer then sustains a loss. In this context, there is debate as to whether this should be regarded as a problem related to the protective scope (extent of compensation) of the infringement of the rights of the direct victim or as an indirect infringement of the rights of the employer.

a. Protective scope

7/747 Predominantly, the problem is seen as consisting in which damage sustained due to the tort by the direct victim must be compensated, provided that the rights of the direct victim were infringed.

(1) Uniformity theory

(i) Adequacy theory

7/748 According to the adequacy theory, this can be resolved as follows.

aa. Basic rule

7/749 As the occurrence of the damage (loss of business profit by the indirect victim) is not generally foreseeable on the basis of the damaging party's act (bodily injury to the victim due to the damaging party's mistake when driving), there is no adequate causal link.

bb. Exception

7/750 If the indirect and direct victims constitute an economic unit, however, then it is possible to draw an adequate causal link between the damaging act to the direct victim and the damage suffered by the indirect victim[210].

210 Supreme Court of 15.11.1968, Minshû 23–12, 2614.

(ii) Protective purpose of the duty

According to the view that takes the protective purpose of the duty as its premise, the question to examine is whether the damage sustained by the indirect victim is covered by the extent of the duty[211]. 7/751

aa. Basic rule

Ordinarily it is not foreseeable that the direct victim is employed by the indirect victim and that the indirect victim sustains a loss when the direct victim cannot perform his work. Therefore, there is no duty on the damaging party to foresee the damage to the indirect victim and avoid it and accordingly, there is no liability to compensate this damage either. 7/752

bb. Exception

If, however, the direct and indirect victims constitute an economic unit, then the indirect victim's claim for compensation is in truth the claim of the direct victim. Therefore, regardless of the outward form of the legal personality, the indirect victim must be granted the right to assert a compensation claim. 7/753

(2) Distinction between primary and consequential harm – consequential harm

According to the Germanic law theory of the connection with wrongfulness (Lehre vom Rechtwidrigkeitszusammenhang), the question is whether the consequential infringement of the indirect victim's rights represents the realisation of an especial danger created by the primary injury to the direct victim. 7/754

(i) Primary injury to the direct victim

An impairment of the indirect victim's assets cannot be seen as the realisation of especial danger created by the primary harm (bodily injury) to the direct victim. The bodily injury to the direct victim does not typically go hand in hand with damage for the employer of the direct victim. 7/755

(ii) Primary injury to the indirect victim

The first question with respect to the indirect victim is, therefore, whether the infringment of the indirect victim's assets constitutes a separate tort, also to be regarded in its own right as primary harm. 7/756

211 *Hirai,* Saiken kakuron II Fuhô kôi [Law of obligations Particular part II Tort] 185 f.

b. Party with standing to claim

7/757 However, there is also widespread support for the view that considers it necessary to examine whether the indirect victim is not entitled himself to assert a claim for compensation due to the interference with his own rights[212]. According to this view, intention or negligence on the part of the damaging party is necessary with respect to the infringement of the indirect victim's rights.

(1) Basic rule

7/758 As the damaging party only infringes the rights of the direct victim, as a rule he cannot foresee the existence of the indirect victim in this respect nor, consequently, the existence of a claim by the indirect victim. Therefore, in relation to the indirect victim's rights infringement, it is not possible to assume there was intention or negligence on the part of the damaging party, meaning that in principle there is no liability for compensation. This is based on the following grounds.

(i) **Entrepreneurial risk**

7/759 Firstly, there is very generally a risk that an employee may not be able to work after an accident so that in essence the indirect victim must himself provide for such circumstance.

(ii) **Requirement of foreseeability**

7/760 Secondly, it would be an excessive limitation of the damaging party's freedom of action if liability was imposed even for non-foreseeable damage.

(2) Exception

7/761 If the direct and indirect victims constitute an economic unit, then the damaging action to the direct victim can be equated to that vis-à-vis the indirect victim.

212 *Shinomiya,* Fuhô kôi [Tort] 528 f; *Shiomi,* Fuhô kôi-hô [Law of tort] 185 f.

Part 8 The compensation of the damage

I. Type of compensation

A. Damages

The legal consequence for a tort is, in principle, the award of compensation (art 709 CC). 7/762

1. Principle of damages

Compensation should in principle be made in money, ie the damage must be quantified in money and this amount of money is to be paid as compensation (art 722 para 1 in combination with art 417 CC). The underlying idea is that it is possible and, moreover, convenient to compensate damage by monetary payment. 7/763

2. Types of damages

Two types of monetary compensation are conceivable. 7/764

a. Compensation by lump-sum payment

One possibility is to pay the whole amount of compensation in the form of a one-time payment as a lump sum. 7/765

(1) Advantages

In general, this method entails the following advantages: firstly, the legal dispute can be resolved once and for all. Secondly, the victim receives certain compensation, regardless of still indeterminable future developments. Thirdly, the need for money can be satisfied directly after the damage has occurred. 7/766

(2) Disadvantages

However, this method does involve the following disadvantages too: firstly, it is not possible to respond if future, as yet undetermined, events develop in an unforeseen manner. Secondly, there is the danger that a large one-off payment leads the victim into spending it wastefully and not utilising it for his further life planning. Thirdly, the damaging party may run into financial difficulties if he has to pay a large sum of money all at once. 7/767

b. Compensation by periodic payment

7/768 Another possible option is to pay the compensation in regular intervals on an ongoing basis.

(1) Advantages

7/769 In general, this method entails the following advantages: firstly, it facilitates a response to future, as yet still undetermined, factors. Secondly, it secures the existence of the victim or bereaved dependents in the long-term. Thirdly, this method is also feasible for a damaging party that does not have the financial means to make a large one-off payment.

(2) Disadvantages

7/770 However, this method also involves the following disadvantages: firstly, there is a risk that the payments, which fall due over an extended period of time, ultimately will not be made if the damaging party's financial situation deteriorates, it is no longer known where he lives or he is no longer willing to pay. Secondly, there may be complications when collecting on the claim if the damaging party moves or there is a case of succession. Thirdly, it may place the parties in a psychologically stressful situation since their relationship to each other is maintained over a long period of time.

c. Court practice

7/771 In court practice, the situation is as follows.

(1) Principle of one-off payment

7/772 In the vast majority of cases, a one-off lump-sum payment is awarded and only seldom is an annuity awarded[213].

(2) Binding submissions by parties

7/773 Furthermore, according to the case law, no annuity payment can be awarded if the parties apply for a lump-sum payment[214].

213 In the decision of the Imperial Court of 16.9.1916, Minroku 22, 1796, an annuity was awarded by way of exception.

214 Supreme Court of 6.2.1987, Hanrei Jihô 1232, 100.

d. Approaches taken in civil procedural law

The Code of Civil Procedure (CCP)[215] recognises the payment of an annuity as one possible form of compensation and balances out some of the above-mentioned disadvantages in its provisions. 7/774

(1) Changes in circumstances

If major changes arise after the end of the oral hearing in the circumstances on which the assessment of damages was based in the context of a binding legal decision on the awarding of compensation in the form of an annuity for the damage that arose by the end of the oral hearing, for instance with respect to the gravity of the consequential ill-health or the amount of the salary, then it is possible to file a claim to have the judgment changed (art 117 para 1 sent 1 CCP). 7/775

(2) Securing the fulfilment of the claim

The issue of how to ensure that the damaging party will meet his obligations as to paying an annuity in the future remains unresolved in the CCP too. 7/776

B. Restitution in kind

Besides compensation in money, it is also conceivable that the state brought about by the legal infringement be remedied and the state previous to the infringement restored. 7/777

1. Basic rule

Under Japanese law, however, compensation of damage is in principle restricted to monetary payments. Basically, there is only restitution in kind when it comes to in rem claims or unjust enrichment actions. 7/778

2. Exception

The CC makes an exception to this rule when it provides for restitution in kind when it comes to injury to the victim's reputation and honour. According to art 723 CC, a court may if so petitioned by the victim order the party who has injured the reputation and honour of another to take suitable measures to restore such reputation and honour, in lieu of compensation in money or in addition to such. 7/779

215 *Minji soshô-hô,* Law no 109/1996 as amended by Law no 30/2012.

II. Assessment of damages

A. Assessment method

7/780 Two different methods of assessing the damages are conceivable.

1. Cumulation of the individual heads of damage

7/781 One method is to determine which heads of damage there are and the extent of the harm sustained under each individual head of damage (eg costs of treatment, hospital charges, loss of profit) and to add this up to ascertain the total damage.

2. Comprehensive assessment of damage

7/782 Another method is to evaluate all facts of damage comprehensively and thus calculate the total damage.

B. Circumstances to be considered when assessing the damage

1. Actual changes to income and expenditure

7/783 Depending on whether the actual changes in the victim's income and expenditure are taken into account or not, two different approaches to assessing damage may be taken.

a. Concrete assessment of damage

7/784 Firstly, the damage can be calculated in accordance with the actual changes that occurred to the victim's income and expenditure. This conforms with the method of accumulating the individual heads of damage.

b. Abstract assessment of damage

7/785 Secondly, on the other hand, it is also possible to extrapolate from the actual changes that ensued to the income and expenditure and to calculate the damage based on the market value.

(1) Comprehensive assessment of damage

7/786 When damage is assessed comprehensively, the damage is calculated based on the »market value«, for example, of the values or interests infringed by a bodily injury.

(2) Cumulation of individual heads of damage

When damage is calculated based on the accumulation of individual heads of damage, the situation is as follows. **7/787**

(i) Positive damage

The positive damage consists, for instance, of the expenditure ordinarily necessary to treat the victim's bodily injury. **7/788**

(ii) Negative damage

The negative damage consists in the reduction of the average income due to the bodily injury sustained. **7/789**

2. Taking the victim's individual features into account

Furthermore, depending on whether the individual features of the victim are taken into account, the following two assessment methods can be distinguished. **7/790**

a. Individual assessment

One method consists in determining the damage according to the actual individual traits of the victim. **7/791**

b. Standard-rate abstract assessment

Another method extrapolates from the individual traits of the specific victim in order to determine the damage in the form of a standard amount. In this respect, fixed sums are stipulated in advance for different categories of injuries and the damage is determined according to which category the victim's injury matches. **7/792**

(1) Standardisation theory

According to the supporters of the standardisation theory, the value of human life and the human body is to be evaluated in standard rates insofar as death or bodily injury are concerned[216]. **7/793**

(2) Road traffic accidents in practice

In practice, standard rates are determined for very typical accidents, such as road traffic accidents, along with guidelines for the evaluation[217]. **7/794**

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216 *Nishihara,* Jurisuto 381 (1967) 148.

217 Sanchô kyôdô teigen [Joint Proposal of the 27th Civil Chamber of the District Court Tokyo, the 15th Civil Chamber of the District Court Osaka and the 3rd Civil Chamber of the District Court

III. Reduction of compensation

A. Mitigation of damages by benefits received (Vorteilsausgleich)

1. Concept

7/795 If the victim also obtains a benefit due to the tort, this benefit must be deducted from the amount of damage; this is referred to as mitigation of damages by benefits received.

2. Rationale

7/796 The rationale behind the mitigation of damages by benefits received is controversial.

a. Difference method (Differenzmethode)

7/797 Firstly, mitigation of damages by benefits received can be rationalised based on the difference method, according to which it is self-evident that the benefit be deducted[218].

(1) Grounds

7/798 The difference method is based on the idea that when the victim's assets have been diminished, the damage sustained is regarded as the sum by which they have been diminished. If there are benefits as well as losses to the victim, the actual damage is determined by adding up losses and benefits.

(2) Problem

7/799 However, if the assessment is limited to a simple mathematical computation, then the victim would also have to set off benefits that he obtained due to inheritance or donations.

b. Principle of the ban on enrichment

7/800 Nowadays, however, it is argued above all that mitigation of damages by benefits received is based on the ban on enrichment. According to this standpoint, the victim should be returned to his earlier state by compensation but not draw any ben-

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Nagoya], see Kôtsû jiko ni yoru menshitsu rieki no santei hôshiki ni tsuite no kyôdo teigen [Joint Proposal on the method of assessing loss of profit in the case of road traffic accidents], Hanrei Jihô 1692 (2000) 162.

218 *Wagatsuma,* Jimu kanri, futô ritoku, fuhô kôi [Negotiorum gestio, unjust enrichment and tort] 204; *Katô,* Fuhô kôi [Tort] 245.

efit exceeding such from the tort. Thus, setting off the benefit must be regarded as an offshoot of the ban on enrichment, which in turn is inferred from the delictual law principle of restitution[219].

3. Which benefits?

The debate centres on which benefits are subject to the principle of mitigation of damages by benefits received. **7/801**

a. Difference method

(1) Basic concept

According to the difference method, the scope of benefits mitigating the damages is also to be determined by the adequacy theory. Consequently, benefits with an adequate causal link to the damaging act are to be offset[220]. **7/802**

(2) Problem

However, the problem is that it is unclear what is to be regarded as adequate in this respect. **7/803**

b. Ban on enrichment

According to the doctrine of the ban on enrichment, on the other hand, it is necessary to examine how the original state can be restored and what benefit would exceed this and thus be inadmissible. In this respect, it is material whether obtaining the benefit and compensating the damage are reconcilable with each other; this is often referred to as a question of the »similar nature of benefit and damage«[221]. **7/804**

(1) Negative interest

If the victim is freed from expenditures due to the tort and if he would gain a benefit exceeding the restoration of his earlier state if he was compensated (for loss of profit) unless the fact that these expenditures have been rendered unnecessary is taken into account, then this benefit must be offset. In this context, it is decisive **7/805**

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219 *Shinomiya,* Fuhô kôi [Tort] 601; *Yoshimura,* Fuhô kôi [Tort]4 171; *Shiomi,* Fuhô kôi-hô [Law of tort] 326.

220 Cf for instance *Wagatsuma,* Jimu kanri, futô ritoku, fuhô kôi [Negotiorum gestio, unjust enrichment and tort] 204; *Katô,* Fuhô kôi [Tort] 245.

221 *Sawai,* Tekisutobukku jimu kanri, futô ritoku, fuhô kôi [Textbook on negotiorum gestio, unjust enrichment and tort]3 248 f; *Shinomiya,* Fuhô kôi [Tort] 602; *Yoshimura,* Fuhô kôi [Tort]4 171 f; *Shiomi,* Fuhô kôi-hô [Law of tort] 327.

whether compensating the lost profit without taking into account saved expenses is admissible.

(2) Positive interest

7/806 If the victim gained income due to the tort and if he would gain a benefit exceeding the restoration of his earlier state if he was compensated without taking this into account, then such benefits must be offset. In this context, it is decisive whether the incomes are aimed at balancing the damage (joint purpose of indemnification).

B. Contributory fault

1. Overview

7/807 Article 722 para 2 CC stipulates that when determining the amount of compensation, the court may take into account whether the victim is also at fault in respect of the damage.

a. Consideration of fault

(1) Discretion as to whether to consider fault

7/808 If there was fault on the part of the victim, it is within the judge's discretion whether or not to take this contributory fault into consideration and, if so, how much this will reduce the compensation[222].

(2) Consideration ex officio

7/809 If the court determines on the basis of the documents submitted during the proceeding that there was contributory fault of the victim, it must ex officio take such into account regardless of whether there are submissions in this respect by the party liable to compensate[223].

b. Reduction of compensation award

7/810 According to art 722 para 2 CC, the judge can merely reduce the amount of compensation but not wholly reject liability. This is clear from the different wording of the provision on failure to perform. Art 418 CC states: »If the obligee is negligent regarding the failure of performance of the obligation, the court shall determine the liability for damages and the amount thereof by taking such elements into

222 Imperial Court of 26.11.1920, Minroku 26, 1911.
223 Imperial Court of 1.8.1928, Minshû 7–9, 648; Supreme Court of 21.6.1966, Minshû 20–5, 1052.

consideration«. Nonetheless, it is questionable whether there is any objective reason for this differentiation.

2. Significance of the victim's »fault«

There is controversy as to the exact meaning of negligence in the sense of art 722 para 2 CC. This is closely connected to the basic problem of how contributory fault is to be classified in relation to how liability arises. **7/811**

a. Re-shifting of the damage back to the victim

The vastly predominant opinion considers that contributory fault is a legal construct that shifts the damage arising from the tort, which in principle the damaging party must compensate, back to the »culpable« victim, in proportion to the contributory fault of such victim. **7/812**

(1) Classification of contributory fault

Contributory fault is accordingly to be classified as follows. **7/813**

(i) Tort – imputation to the damaging party

If the prerequisites for delictual liability (intentional and/or negligent infringement of a right and causation) are met, the damaging party is liable to compensate the damage. This shifts the damage, which in fact the owner of the rights (the victim) would have had to bear, to the damaging party. **7/814**

(ii) Contributory fault – imputation back to the victim

Insofar, however, as »fault« on the part of the victim has contributed, the victim can be required to bear this proportion of the damage. Hence, on the basis of contributory fault, damage that firstly is shifted to the damaging party is then imputed back to the victim. **7/815**

(2) Justification for shifting damage back to victim

The problem is how to rationalise this re-shifting of the damage back to the victim. **7/816**

(i) True fault

On the one hand, it is argued that the principle of fault is applicable here too and the victim must be held liable for the damage based on his fault[224]. **7/817**

224 *Wagatsuma,* Jimu kanri, futô ritoku, fuhô kôi [Negotiorum gestio, unjust enrichment and tort] 209.

aa. Significance of »fault«

7/818 »Fault« is understood in the same manner here as the fault that must be found on the part of the damaging party under art 709 CC.

bb. Victim's capacity to commit delicts

7/819 It is a prerequisite that the victim, like the damaging party, has the capacity to commit delicts[225].

(ii) **Not true fault**

7/820 Nowadays, however, the predominant view is that the fault principle is not directly applicable in case of contributory fault; instead, it is considered necessary to adapt it.

aa. Lack of due care

7/821 According to prevailing opinion, contributory fault is not about recognising the victim's liability but about reducing compensation for reasons of fairness. Accordingly, no fault on the part of the victim in the conventional sense is necessary; rather it is sufficient that there is some blameworthiness which makes reducing the damages for fairness considerations appear appropriate[226].

aaa. Meaning of »fault«

7/822 According to this interpretation, »fault« means no more or less than simple lack of care.

bbb. Victim's capacity to commit delicts

7/823 This does not necessarily mean that the victim must have the capacity to commit delicts, ie have the ability to recognise that his conduct involves liability; it is sufficient that his reasoning ability is such that he would be able to apply the care necessary to avoid the damage (this corresponds to the reasoning ability of a child of about six years old).

bb. Duty to mitigate damage

7/824 Another view that certainly also holds influence contends that the rule on contributory fault is based on the duty to mitigate damage. While the injuring party may not infringe the rights of another person, the owner of the relevant rights, on the other hand, is not prohibited from injuring his own rights since he may dispose

225 *Wagatsuma,* Jimu kanri, futô ritoku, fuhô kôi [Negotiorum gestio, unjust enrichment and tort] 210.

226 *Katô,* Fuhô kôi [Tort] 247. Cf also Supreme Court of 24.6.1964, Minshû 18–5, 854.

of such as he sees fit. Nonetheless, since delictual liability is about shifting damage from one party to another, namely the injuring party, the victim is definitely under obligation to avoid the damage or reduce it in order not to further burden the tortfeasor[227].

aaa. Meaning of »fault«

According to this view, fault thus means that the victim does not fulfil the expectations placed in him to the effect that he will act so as to avoid or reduce the damage[228]. **7/825**

bbb. Victim's capacity to commit delicts

This requires a reasoning ability on the part of the victim, limited, however, to a requirement that he must be able to apply the care necessary to avoid the damage. In this case, this means that he must have the ability to recognise that he is at risk and must also have the abilities that admit of an expectation that he avoid or reduce the damage[229]. **7/826**

b. Limitation of the scope of the injuring party's liability

According to another view, there is no re-shifting of the liability but instead the injuring party's liability does not extend in the first place to that part which can be ascribed to the victim's »fault«; therefore, the victim's powers of reasoning are immaterial. Two rationales for this view are conceivable. **7/827**

(1) Rationale based on causation

One possible argument is that the scope of liability is determined according to whether and to what extent there is a causal link between the injuring party's conduct and the occurrence of the result. **7/828**

(i) Partial (apportionable) causation

In the event that several causes for the damage compete, this view assumes that each cause of damage influenced the overall damage due to its respective causal effect, but each were only partially causal in relation to the overall damage, so that the scope of liability must also be restricted to this extent. Therefore, according to this view, contributory fault means nothing more or less than that not only the injuring party's conduct but also that of the victim constitutes a partial cause for the **7/829**

227 Cf *Kubota,* Kashitsu sôsai no hôri [Legal theory of contributory fault] 192 ff, in particular 198 f, 205 f. Also *Shiomi,* Fuhô kôi-hô [Law of tort] 305, 310 f, arguing basically this view.

228 *Kubota,* Kashitsu sôsai no hôri [Legal theory of contributory fault] 205 f.

229 *Kubota,* Kashitsu sôsai no hôri [Legal theory of contributory fault] 201 f.

overall damage and the scope of the injuring party's liability must be determined in line with his share in causation[230].

(ii) Criticism

7/830 However, this interpretation of causation gives rise to the following problems[231].

aa. Interpretation of causation

7/831 Since according to both scientific and popular observation, every result can be traced to myriad causes, legal causation is assessed using the conditio sine qua non formula in most legal systems. However, if the respective share in causation is taken as the basis, this conflicts with precisely such understanding of causation. Besides this, it is also impossible to determine such shares objectively on the basis of evidence submitted.

bb. Legal evaluation

7/832 Furthermore, this view leaves it unclear why the scope of legal liability should be determined on the basis of the actual causality.

(2) Rationale based on wrongfulness

7/833 Another view seeks to found the limited liability of the injuring party not in causation but on the degree of wrongfulness on the part of the same.

(i) Reduction of wrongfulness

7/834 Some see this as a reduction of the wrongfulness of the injuring party's conduct due to the victim's »fault«[232]. When it comes to contributory fault, the issue is the assessment of what the injuring party was under obligation to do given the circumstances created by the victim and to what extent he in fact failed to do it, ie the injuring party's liability is determined according to the degree of wrongfulness.

(ii) Balancing of both parties' wrongfulness

7/835 Others again, however, see this issue as balancing the wrongfulness of the injuring party against that of the victim, in order to arrive at the scope of the injuring party's liability[233].

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230 *Hamagami,* Songai baishô-hô ni okeru »hoshô riron« to »bubunteki inga kankei no riron« [The theory of compensation and the theory of partial causation in the field of the law of damages], Minshô-hô Zasshi 66–4 (1972) 14 ff.

231 *Hirai,* Saiken kakuron II Fuhô kôi [Law of obligations Particular part II Tort] 147; *Shiomi,* Fuhô kôi-hô [Law of tort] 309.

232 *Kawai,* Kashitsu sôsai no honshitsu [The nature of contributory fault], Hanrei Taimuzu 240 (1970) 10.

233 *Hashimoto,* Kashitsu sôsai hôri no kôzô to shatei (1)-(5) [Structure and scope of the principle of contributory fault (1)-(5)], Hôgaku Ronsô 137–2, 16; 137–4, 1; 137–5, 1; 137–6, 1; 139–3, 1; in particular 137–6, 31.

aa. Balancing

The underlying idea is that when both parties infringe a duty of conduct regarding the same legally protected interests of the victim, both parties' wrongfulness must be »balanced« against each other, thus reducing the wrongfulness for which the injuring party is accountable[234]. **7/836**

aaa. On the part of the injuring party

On the part of the injuring party, there is infringement of a conduct duty to not injure the victim's legal goods. **7/837**

bbb. On the part of the victim

On the part of the victim, there is also an infringement of a conduct duty insofar as he has not averted the risk he is subject to, although he could be expected to do so. **7/838**

bb. Justification for why the victim should bear damage – principle of responsibility for own sphere

The reduction of the injuring party's wrongfulness is based in this case on the idea that the victim must himself bear damage that arises from his own sphere[235]. **7/839**

C. Extension of contributory fault – victim's predisposition

If physical or psychological characteristics or an illness of the victim constitute a cause for the occurrence or aggravation of the damage, the question is whether this should be considered as a ground for reducing the amount of compensation. **7/840**

1. Affirmation that predispositions of the victim should be considered

According to case law, any predisposition of the victim that has contributed to the occurrence or aggravation of the damage will be taken into consideration in analogous application of art 722 para 2 CC when determining the compensation, insofar as it must be deemed unfair to impose the full burden of the damage upon the injuring party[236]. **7/841**

234 *Hashimoto,* Hôgaku Ronsô 137–6, 32 ff.

235 *Hashimoto,* Hôgaku Ronsô 137–6, 36 ff. The principle of responsibility for one's sphere is thus a rule for the apportionment of the risk depending on which sphere (of influence or operational responsibility) the cause (risk of damage) lay.

236 Supreme Court of 21.4.1988, Minshû 42–4, 243.

a. Predispositions to be considered

7/842 In this respect, the question is which predispositions of the victim must be considered.

(1) Psychological factors

7/843 The consideration of psychological factors has been established[237].

(2) Physical factors

7/844 With respect to physical factors, the following two cases must be distinguished.

(i) Illness

7/845 If the victim suffers from an illness, this must be taken into account in line with its type and severity[238].

(ii) Unusual physical characteristics

7/846 However, when the issue is deviations from average body stature or normal constitution, such as do not amount to any illness, these are to be considered as follows[239].

aa. Basic rule

7/847 In principle, such factors are not to be taken into account. Body stature and constitution are not the same for all individuals and so it must be seen as a matter of course that there are more unusual manifestations within the bounds of individual differences. It is not possible to reduce the compensation on this basis.

bb. Exception

7/848 By way of exception, such may be considered if someone has unusual physical characteristics that depart substantially from the average values for ordinary people, and he has not been more careful than ordinary people despite the risk of a grave injury.

b. Justification for taking this into account

7/849 However, it is questionable how taking such predispositions into account leads to fairer distribution of damage. The following two approaches seek to explain it.

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237 Supreme Court of 21.4.1988, Minshû 42–4, 243.

238 Supreme Court of 25.6.1992, Minshû 46–4, 400; Supreme Court of 27.3.2008, Hanrei Jihô 2003, 155.

239 Supreme Court of 29.10.1996, Minshû 50–9, 2474.

(1) Reduction of compensation in line with the contribution towards the damage

One view seeks to explain this as a consideration of the predisposition's contribution towards the damage. **7/850**

(i) Basic concept

According to this, the injuring party must only bear the damage to the extent that his damaging conduct has contributed to the occurrence of the result in question[240]. **7/851**

(ii) Criticism

The following is raised as criticism of this idea. **7/852**

aa. Interpretation of causation

With respect to causation, there are the problems already mentioned above. **7/853**

bb. Impossibility of restriction with respect to the characteristic being taken into consideration

According to this view, any and all unusual physical features that have contributed to the damaging result must be taken into account. **7/854**

(2) Theory of sphere of influence or responsibility

According to another view, the problem can be resolved by application of the theory of sphere of influence or responsibility. **7/855**

(i) Justification of why the victim should bear the damage – theory of sphere of influence or responsibility

As the predisposition belongs to the sphere of the victim, it is such who must bear this risk as well[241]. **7/856**

(ii) Possibility of restriction with respect to the predisposition being taken into consideration

The question is which risks must be assigned to the victim. **7/857**

240 *Nomura,* Inga kankei no honshitsu [The nature of causation], in: Kôtsû jiko funso shori sentâ seiritsu 10 shunen kinen ronbun-shû [Commemorative publication on the 10th anniversary of the Centre for Settlement of Traffic Accidents Disputes] (1984) 62.

241 *Hashimoto,* Hôgaku Ronsô 139–3, 21 ff.

aa. General risk

7/858 If a general risk of life manifests, then the injuring party who has caused this by culpable conduct, must bear all consequences.

bb. Special risks

7/859 On the other hand, if a risk that must not be expected in social life manifests, the victim must only bear the consequences when such arise from his own legal sphere.

(iii) **Problem**

7/860 Nonetheless, it is difficult to assess what qualifies as a general risk of life[242].

2. Negation that predispositions of the victim should be considered

7/861 Nonetheless, there is also an influential view to the effect that a predisposition on the part of the victim that has contributed to the occurrence or aggravation of the damage may not be considered as a ground to reduce the amount of compensation[243].

a. Rationale

7/862 This is reasoned as follows.

(1) Predisposition took effect due to injuring party's tort

7/863 In the absence of the injuring party's tort, the predisposition would not have taken effect and the damage would not have occurred in the first place or been aggravated[244].

(2) Unjustified that the victim bear the damage

7/864 However, it would no longer be relevant whose conduct brought the risk inherent in the predisposition into effect if such is assigned to the victim. This view therefore also takes special grounds as its basis to argue that it is unjust to assign the risk to the victim.

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242 *Hashimoto,* Hanhi: Saihan Heisei 8-nen 10-gatsu 29-nichi [Comment on a Supreme Court judgment of 29.10.1996], Minshô-hô Zasshi 117–1 (1997) 100, seeks to base the argument on whether a predisposition goes beyond the scope of simple individual differences.

243 *Kubota,* Kashitsu sôsai no hôri [Legal theory of contibutory fault] 70 f; *Hirai,* Saiken kakuron II Fuhô kôi [Law of obligations Particular part II Tort] 159 f; *Yoshimura,* Fuhô kôi [Tort]4 180; *Shiomi,* Fuhô kôi-hô [Law of tort] 322 f.

244 This is based on the oft-mentioned idea originating in English law that »a tortfeasor takes his victim as he finds him«.

(i) Excessive restriction of the victim's freedom

When predispositions are taken into account, there is a danger that the freedom of action of those who have such predispositions is restricted and their participation in social life made more difficult because they are under a greater obligation to avoid being a victim of a tort. **7/865**

(ii) Concept of social solidarity

Furthermore, consideration of the predisposition is imperative, just as is the capacity to commit delicts, on the basis of the concept of social solidarity. **7/866**

aa. Capacity to commit delicts

In order to enable even those without the capacity to commit delicts to take part in public life, the victim must accept damage by those incapable of committing delicts as inevitable and bear it himself. **7/867**

bb. Victim's predisposition

In a similar fashion, the party who engaged in the damaging conduct must bear the increased risk of the damage occurring and being aggravated due to the victim having a special predisposition, in order to facilitate the person who has such a predisposition taking part in social life. **7/868**

b. Consideration within the framework of contributory fault

If there has been a violation of the duty to mitigate damage on the part of the victim, then there is usually contributory fault. If it is reasonable to expect the victim to recognise his predisposition and to be in control of it and if consequently, he would have been able to control his own conduct accordingly, then failure to do so must be counted against him and thus the compensation reduced. **7/869**

D. Reduction of the duty to compensate

In Japanese law, there is no provision on reducing the duty to compensate out of equity considerations. Neither does academic literature or case law refer to necessity for such a provision. This could be because no grave problems arise in this respect since it is possible to be freed from liability under Japanese insolvency law (art 248 ff Bankruptcy Law)[245]. **7/870**

245 *Hasan-hô,* Law no 75/2004 as amended by Law no 45/2013.

Part 9 Prescription of compensation claims

7/871 Article 724 CC states: »The right to demand compensation for damage in tort shall be extinguished by the operation of prescription if it is not exercised by the victim or his/her legal representative within three years from the time when he/she comes to know of the damage and identity of the perpetrator. The same shall apply when twenty years have elapsed from the time of the tortious act.«.

I. Short prescription period under art 724 sent 1

A. The significance of the short prescription period

1. The nature of the short prescription period

a. Prescription of claims

7/872 The general prescription period for claims is ten years (art 167 para 1 CC), beginning from the point in time when the right may be asserted (art 166 para 1 CC).

b. Short prescription period for compensation claims arising out of tort

7/873 By contrast, art 724 sent 1 CC may be seen as a rule providing for a shorter prescription period of only three years, starting to run from when there is knowledge of both the damage and damaging party.

2. Reason for the short prescription period

7/874 The grounds for introducing such a short prescription period are controversial[246].

246 *Matsuhisa,* Jikô seido no kôzô to kaishaku [Structure and interpretation of the law on prescription] (2011) 452 ff.

a. In order to avoid evidentiary difficulties

According to one view, the reason for the shorter prescription period is to avoid difficulties when it comes to giving evidence[247]. **7/875**

(1) Rationale

Since torts come about unexpectedly, this view holds that it is more likely in such case than in the case of contractual claims that as time goes on evidence is lost and it becomes difficult to give evidence. The short prescription period was thus introduced, so the view contends, in order to prevent unfair claims and/or to avoid having the damaging party fall into difficulties as regards providing exculpatory evidence[248]. **7/876**

(2) Criticisms levelled

With respect to this line of argumentation, the following problems have been identified. **7/877**

(i) Consistency with the longer period of 20 years?

For one thing, the argument that the shorter period is necessary to avoid evidentiary difficulties cannot explain why there is still a parallel long period of 20 years after the tort has been committed[249]. **7/878**

(ii) Consistency with respect to when the period begins?

If, furthermore, the reason is to protect the damaging party against evidentiary difficulties in relation to proving he is not liable, then why does the period not start to run once the tort has been committed but only once the victim has knowledge of damage and damaging party[250]? **7/879**

b. Sense of injury subsides over time

Another school of thought sees the shorter prescription period as a reflection of how the victim's sense of having been injured subsides over time[251]. **7/880**

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247 *Shinomiya,* Fuhô kôi [Tort] 646; *Morishima,* Fuhô kôi-hô kôgi [Textbook on the law of tort] 429 f; *Shiomi,* Fuhô kôi-hô [Law of tort] 285 f.

248 *Matsuhisa,* Jikô seido no kôzô to kaishaku [Structure and interpretation of the law on prescription] 452 f.

249 *Suekawa,* Kenri shingai to kenri ran'yô [Infringement of rights and abuse of rights] (1970) 647; *Uchiike,* Fuhô kôi sekinin no shômetsu jikô [Prescription in the case of delictual liability] (1993) 32 f.

250 *Matsuhisa,* Jikô seido no kôzô to kaishaku [Structure and interpretation of the law on prescription] 456.

251 *Suekawa,* Kenri shingai to kenri ran'yô [Infringement of rights and abuse of rights] 634, 648 f. *Wagatsuma,* Jimu kanri, futô ritoku, fuhô kôi [Negotorium gestio, unjust enrichment and tort]

(1) Rationale

7/881 Supporters of this view argue that since the sense of having been injured subsides over time, it would be actually preposterous to restart the dispute after this. Thus, when a certain period of time has elapsed since the point in time when the victim or his legal representative gained knowledge of the damage and damaging party, it may be assumed that the victim's feelings have also calmed down again; therefore, it is appropriate that the compensation claim be extinguished.

(2) Criticism

7/882 This view is regarded as problematic in the following ways.

(i) Relationship to the reason for the claim arising

7/883 Firstly, it is generally recognised that the compensation claim itself arises completely independently of the knowledge and the feelings of the victim. Therefore, neither can the fact that the knowledge or the feelings of the victim have diminished alone serve as a justification for extinguishing it[252].

(ii) Conflict with the purpose of the law of torts

7/884 Justifying prescription simply by reference to the feelings of the victim is, furthermore, irreconcilable with the main purpose of the law of torts, which is namely to compensate the loss suffered[253].

c. Safeguarding the expectations of the party liable to pay compensation

7/885 A third view sees the reason for the shorter prescription period as being to protect the expectations of the party liable to pay compensation[254].

(1) Rationale

7/886 According to this view, it can be taken for granted that the liable party (damaging party) expects that the party entitled to compensation (victim) has forgiven him or will not assert his claim if such does not assert his entitlement within a reasonable amount of time. If the entitled party suddenly seeks compensation after a long period during which he raised no claim, the expectations of the liable party

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214; *Katô,* Fuhô kôi [Tort] 263; *Maeda,* Minpô IV-2 (Fuhô kôi-hô) [Civil law IV-2 (Law of torts)] 388; *Ikuyo/Tokumoto,* Fuhô kôi-hô [Law of tort] 347 ff, thus cite both the evidentiary difficulties and the diminuition of the sense of having suffered injury, as reasons.

252 *Uchiike,* Fuhô kôi sekinin no shômetsu jikô [Prescription of delictual liability] 34.

253 *Morishima,* Fuhô kôi-hô kôgi [Textbook on the law of tort] 429; *Shiomi,* Fuhô kôi-hô [Law of tort] 285.

254 *Uchiike,* Fuhô kôi sekinin no shômetsu jikô [Prescription of delictual liability] 34 ff.

will be disappointed; this would be inadmissible, argue supporters of this view, hence the prescription period is shortened.

(2) Criticism

In criticism of this view, it is argued that it is not a legitimate expectation if the liable party, who after all committed the tort and thus caused the damage, relies on the victim having forgiven him merely because such has not yet exercised his right[255]. **7/887**

B. Commencement of the prescription period

The short prescription period begins at the point in time when the victim or his legal representative gains knowledge of the damage and damaging party. **7/888**

1. Significance

The underlying idea is that the prescription period should only start to run from the time when it becomes possible to assert the compensation claim, since prior to this, it is not possible to assume that the entitled party is merely failing to assert his right. Only when damage has resulted from a tort and the damaging party has been identified, is it possible for him to assert a compensation claim against the damaging party and thus, the prescription period should only start to run at this point. **7/889**

2. Knowledge of the tort

Accordingly, it is a prerequisite that the victim or his legal successor gains knowledge of the tort[256]. For as long as he has no knowledge of the tort, he cannot assert any compensation claim. **7/890**

3. Knowledge of the damaging party

Further, it is necessary that the victims have knowledge of the damaging party. »Damaging party« in this context means the party who is obliged to compensate. **7/891**

4. Knowledge of the damage

Finally, the victim must also have knowledge of the damage. **7/892**

255 *Morishima,* Fuhô kôi-hô kôgi [Textbook on the law of tort] 427.

256 Imperial Court of 15.3.1918, Minroku 24, 498; Supreme Court of 27.6.1968, Shômu Geppô 14–9, 1003.

a. Significance

7/893 The point in time at which the victim gains knowledge of the damage means in this context the time at which the victim gained sufficient knowledge to seek compensation of the damage from the damaging party, and was also actually in a position to do so[257].

(1) What must the victim know?

7/894 It is sufficient that the victim has knowledge of the fact of damage having occurred; knowledge of the extent and nature of the damage is not necessary[258].

(2) Scope of knowledge

7/895 It is controversial whether the victim must really have knowledge of the damage having arisen. According to the case law, the prescription period only starts to run when the victim really has knowledge of the damage having arisen[259]. This is based on the following considerations.

(i) Expectation that claim will be asserted

7/896 If the victim really has no knowledge of the damage having arisen, neither can he be expected to assert the claim against the damaging party.

(ii) Need to protect the victim

7/897 Furthermore, if it was sufficient merely that the occurrence of the damage be identifiable, this would mean that the victim would have to research whether damage has arisen. However, it would not be justifiable to impose such a burden on the party who has suffered damage due to a tort.

b. Ongoing tort

7/898 If the tort continues in time, the question of when the prescription period commences arises anew. In this respect, two types of damage must be distinguished[260].

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257 Supreme Court of 16.11.1973, Minshû 27–10, 1374; Supreme Court of 22.4.2011, Kin'yû Hômu Jijô 1928, 119.

258 Imperial Court of 10.3.1920, Minroku 26, 280.

259 Supreme Court of 29.1.2002, Minshû 56–1, 218; Supreme Court of 21.11.2005, Minshû 59–9, 2258.

260 See *Fujioka,* Fuhô kôi ni yoru songai baishô seikyû-ken no shômetsu jikô [Prescription of compensation claims based on delict], Hokudai Hôgaku Ronshû 27–2 (1976) 33, as well as further *Shinomiya,* Fuhô kôi [Tort] 650; *Morishima,* Fuhô kôi-hô kôgi [Textbook on the law of tort] 446 f; *Yoshimura,* Fuhô kôi [Tort]⁴ 185 f; *Shiomi,* Fuhô kôi-hô [Law of tort] 290 f.

(1) Continuing infliction of damage

One type is when the ongoing damage can be separated into parts, for example in the case of unlawful possession of a piece of land or when sunlight is blocked. In such case, it is possible to set out claims for the individual parts of damage separately, so that every day a new compensation claim arises, with its own prescription period starting respectively at the time the damage became known[261]. **7/899**

(2) Cumulative damage

Another form of damage is when the ongoing, damaging act results in an accumulation of impairments, all of which must be seen as one, uniform injury, such as health injury due to environmental pollution, eg by noise, vibrations (oscillations), air pollution or water pollution. In such case, a single, comprehensive claim for compensation arises, so that prescription starts to run at the time the continued damaging act ends or the time when the victim dies[262]. **7/900**

c. Secondary diseases

If the victim continues to suffer from a secondary disease subsequent to bodily injury due to a tort or if such arises, the question of when prescription begins to run is posed. In this respect, the following two types of cases must be distinguished. **7/901**

(1) Continuing secondary disease

The first type of case is when the secondary disease continues from the time of the injury due to the tort and also after a considerable time has passed without improvement. In this case, the time of the diagnosis that the diseased state has consolidated is considered to be the point in time that the victim gained knowledge of the damage. At this point the victim in fact knows the secondary disease exists and thus has sufficient knowledge of the damage occurring to be able to assert a compensation claim against the damaging party[263]. **7/902**

(2) Later onset secondary disease

The second case is when a secondary disease emerges newly after a considerable time has passed subsequent to the injury due to the tort. **7/903**

261 Imperial Court of 14.12.1940, Minshû 19, 2325.

262 *Maeda,* Minpô IV-2 (Fuhô kôi-hô) [Civil law IV-2 (Law of torts)] 390; *Morishima,* Fuhô kôi-hô kôgi [Textbook on the law of tort] 446 f; *Shiomi,* Fuhô kôi-hô [Law of tort] 290; *Yoshimura,* Fuhô kôi [Tort][4] 185 f.

263 Supreme Court of 24.12.2004, Hanrei Jihô 1887, 52.

(i) Unity of the disease

7/904 If this damage forms a single category with the damage that arose earlier from the tort and if it was even then foreseeable, then it is not to be regarded as separate damage. In such case, the prescription period consequently begins to run when the victim gains knowledge of the first aspect of the damage to emerge[264].

(ii) Separate secondary disease

7/905 If the secondary disease is not foreseeable when the first damage arises, however, this is separate damage.

aa. Basic rule

7/906 According to case law, the victim gains knowledge of the damage as soon as the secondary disease is manifest, so that the prescription period starts to run then[265]. When the secondary disease becomes manifest, the damage resulting from such becomes foreseeable and the victim is thus in a position to assert a compensation claim; therefore, the prescription period starts to run at this point in time.

bb. Exception

7/907 However, if methods of treatment become necessary that could not normally have been foreseen at the time of the injury or when the secondary disease arose and if such result in expenses, the prescription period in respect of such costs necessary for the treatment does not start to run until the victim has received this treatment[266]. In this case too, it cannot be expected that the victim assert the compensation claim until the actual treatment.

II. Long period under art 724 sent 2 CC

A. Purpose of the long period

1. Nature of the long period

7/908 It is disputed whether the long period under art 724 sent 2 CC represents a prescription period or a cut-off period.

264 Supreme Court of 18.7.1967, Minshû 21–6, 1559.
265 Supreme Court of 26.9.1974, Kôtsû Jiko Minji Saiban Reishû 7–5, 1233.
266 Supreme Court of 18.7.1967, Minshû 21–6, 1559.

a. Problem issue

Depending on whether it is taken to be a prescription period or a cut-off period, the following differences are relevant. **7/909**

(1) Prescription period

(i) Interruption

If it is a prescription period, it is possible for the prescription to be interrupted. **7/910**

(ii) Invoking the defence of prescription

The parties may invoke the defence of prescription. However, if there is a violation of good faith or an abuse of a right, it may be that this defence is not recognised. **7/911**

(2) Cut-off period

(i) Interruption

In the case of a limitation period, no interruption of the period is possible. **7/912**

(ii) Invoking cut-off period as a defence

Further, there is no question of having to assert the fact of limitation since the right is automatically extinguished with the expiry of the cut-off period. **7/913**

b. Prescription

In academic writing, there is an influential school of thought to the effect that the long period under art 724 sent 2 CC is a prescription period. This is based on the following ideas[267]. **7/914**

(1) Wording of the provision

Article 724 sent 1 CC refers expressly to »prescription« of the claim. In sent 2 it stipulates »the same shall apply«. Therefore, according to this view, sent 2 must clearly also refer to a prescription period. **7/915**

(2) How it emerged

During the drafting of the CC, a prescription period of 20 years was set out in relation to all rights with the exception of ownership rights. The long period in the previous version of art 724 CC was based on the analogous application of this pro- **7/916**

267 *Uchiike,* Fuhô kôi sekinin no shômetsu jikô [Prescription of delictual liabiliy] 128. Miyazaki branch of Fukuoka High Court of 28.9.1984, Hanrei Jihô 1159, 108 (preliminary instance before the Supreme Court of 21.12.1989 see under FN 269) is also based on these ideas.

vision. This also shows that the 20 year period was the standard period set for prescription[268].

c. Cut-off period

7/917 Case law, on the other hand, regards the long period stipulated in art 724 sent 2 CC as a cut-off period[269].

(1) Reasons

7/918 This is for the following reasons.

(i) Purpose of art 724 CC

7/919 Since the three year prescription period under art 724 sent 1 CC takes as its premise the time when the victim was aware of both damage and damaging party, it does not start to run as long as the victim has no knowledge of such. The purpose of art 724 sent 2 CC is, therefore, to serve the end of rapidly achieving comprehensive clarification of the legal relations connected with a tort after 20 years have expired from the time of the tort.

(ii) No requirement that it be raised

7/920 This aim would mean that the compensation claim arising from the tort must be extinguished regardless of whether this is raised by the parties after 20 years have passed.

(2) Criticism

7/921 This standpoint taken by case law comes in for heavy criticism, however[270]. The most important points of criticism are the following three.

(i) Doubt as to the necessity for fast, comprehensive clarification

7/922 The first criticism concerns the assumption that the purpose of art 724 CC is to obtain rapid, comprehensive clarification of the legal relations. For at least with respect to the long period of 20 years it is hardly possible to see the purpose of the provision as lying in rapid clarification of the legal relations.

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268 *Tokumoto,* Songai baishô sekyû-ken no jikô [Prescription of compensation claims], in: Hoshino (ed), Minpô kôza 6 [Textbook civil law vol 6] 705 ff.

269 Supreme Court of 21.12.1989, Minshû 43–12, 2209.

270 *Matsumoto,* Jikô to seigi [Prescription and justice] (2002) 387.

(ii) Possibility of interruption

Secondly, it is pointed out that there must necessarily be a possibility to interrupt the period. As a rule, there is no problem in this context since when there is a ground for interruption, the three year period is also interrupted. However, if the 20 year period is seen as a cut-off period, then the right is extinguished after 20 years, even if the three year period has meantime been interrupted by the claim being recognised. **7/923**

(iii) Violation of good faith as well as abuse of a right

Thirdly, assuming the long period to be a limitation period may give rise to problems with respect to violations of good faith as well as abuse of rights. In the case of a cut-off period, the parties cannot assert such but it is certainly possible to submit that the cut-off period has expired. It is conceivable that art 724 CC be interpreted to the effect that an extinguishment of the right due to the expiry of the cut-off period offends against good faith and thus may not be recognised. There is no reason to exclude such a possibility, especially as there is already doubt as to the necessity for rapid and comprehensive clarification of the legal relations[271]. **7/924**

2. Possibility of suspending the period

a. Problems

If the owner of a right is hindered from engaging in an action that would interrupt the prescription period, then there is no prescription even if the period expires; instead it only expires when this obstacle disappears and a certain period of time has elapsed thereafter (arts 158–161 CC). However, it is questionable whether such a suspension applies to cut-off periods as well. **7/925**

b. Rejection of suspension

According to this view, there cannot be any suspension of a cut-off period as such comprehensively limits the period during which a right may be exercised. **7/926**

c. Advocation of suspension

Case law, on the other hand, proceeds on the premise that suspension is possible even with respect to limitation periods[272]. This is based on the following reasons. **7/927**

271 *Shiomi,* Fuhô kôi-hô [Law of tort] 296 f.

272 Supreme Court of 6.12.1998, Minshû 52–4, 1087; Supreme Court of 28.4.2009, Hanrei Jihô 2046, 70.

(1) Impossibility of exercise of right

7/928 The exercise of the right would no longer be allowed simply because 20 years had elapsed although the victim was not able to exercise the right.

(2) Unjustified relief of the damaging party's position

7/929 Moreover, it would be a crass violation of the principle of justice if the damaging party, who provided the cause for the victim not being able to exercise his right, should be freed from liability for the damage by the expiry of 20 years.

(3) Equivalence with prescription

7/930 Just as in the case of prescription, therefore, the victim must be protected so that a limitation of the effects of art 724 sent 2 CC serves the requirements of justice.

B. Commencement of the long period

7/931 The long period begins at the time the tort was committed. It is nonetheless controversial what exactly this means.

1. Time of the damaging act

7/932 If the wording of the provision is taken as a premise, then »the time of the tortious act« is the point in time at which the damaging act is committed[273].

2. Time the damage occurred

7/933 Case law, however, sees the beginning as being the time when all or part of the damage occurred if the damage occurred after the expiry of a reasonable length of time once the damaging act was ended[274].

a. Examples

7/934 This becomes relevant, firstly, when damage is caused by harmful substances that are stored in the body, and secondly, in cases in which the damage caused by an illness only emerges after a certain incubation period.

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273 *Suekawa,* Kenri shingai to kenri ran'yô [Infringement of a right and abuse of rights] 665 f.

274 Supreme Court of 27.4.2004, Minshû 58–4, 1032; Supreme Court of 27.4.2004, Hanrei Jihô 1860, 152; Supreme Court of 15.10.2004, Minshû 58–7, 1802; Supreme Court of 16.6.2006, Minshû 60–5, 1997. *Shinomiya,* Fuhô kôi [Tort] 651; *Hirai,* Saiken kakuron II Fuhô kôi [Law of obligations Particular part II Tort] 170; *Shiomi,* Fuhô kôi-hô [Law of tort] 299 also proceed on the basis of the time when the damage occurred.

b. Rationale

This is argued as follows. **7/935**

(1) Impossibility of exercising the right

If in such cases the period was allowed to expire possibly even before the damage has occurred, this might mean that the victim is thus prevented from exercising his right although he in fact was at no point able to do so. **7/936**

(2) Foreseeability from the perspective of the damaging party

Furthermore, the damaging party must assume that in view of the type of damage that he has caused by his acts, the victim will only seek compensation after a reasonable period of time has passed. **7/937**

Comparative Conclusions

Helmut Koziol

Comparative Conclusions

Kapitel 8

Comparative Conclusions

Helmut Koziol*

Preliminary remarks

8/1 In the Preface of »Basic Questions of Tort Law from a Germanic Perspective« I explained that the comprehensive responses of the representatives of other legal systems will be instrumental in the draft of my conclusions on the overall study. I further pointed out that the conclusions would seek to provide substantial answers founded on comparative research to the fundamental questions of tort law and in so doing – besides encouraging fruitful worldwide discussions – make an attempt to guide future developments in European tort law.

8/2 Guidance may be given to national legislators, courts and scholars[1] but in particular to the European Union in the hope of supporting its process of *harmonisation* – or even unification – of European tort law. This raises the previous question of whether we need such harmonisation and if harmonisation of European tort law can really happen. The statements by the representatives of other national legal systems also gave some interesting insights which may be relevant in answering such queries. It is therefore expedient to go into these questions in detail and in so doing to demonstrate the relevance of this project.

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* Translation from German to English by *Fiona Salter Townshend.*

1 The possibility of »soft harmonisation« from the inside by influences on the national legislatures, courts and scholars is emphasised by *G. Wagner,* The Project of Harmonizing European Tort Law, in: Koziol/B.C. Steininger (eds), European Tort Law 2005 (2006) 651, 670 ff.

I. Necessity of harmonising European tort law?[2]

8/3 The call for harmonisation of private law and thus, among other areas, also tort law is often heard and several groups of scholars have already worked on designing future tort law as part of an entire code[3] or as a separate draft[4]. However perhaps the question on the tip of your tongues is whether harmonisation is really a necessity or at least whether it brings advantages[5]. Doubts in this respect seem reasonable when looking at the USA: it is a state and not only a more or less loose community of national states like the EU; nevertheless, 50 different legal systems exist in the USA. But one has to take into account that the legal systems of the EU Member States *vary* a great deal more than the legal systems of the states in the USA. There exists not only a fundamental difference between the common law in England and Ireland on the one hand and the Continental civil law on the other but also divergences between the civil law systems, eg in respect of the notion of fault or wrongfulness, strict liability and vicarious liability, recoverable non-pecuniary loss and time limitations. The Member States have been independent countries for centuries and, therefore, their legal cultures – although originally partly based on Roman law[6] – pursue different paths. This is true, of course, with regard to the »legal families« eg, the Germanic, the Scandinavian and the Romance families. But even between the legal systems of the German-speaking countries, there are decisive differences.

8/4 Bearing this in mind, the main justification for harmonisation seems understandable, namely that the differences between the legal systems are hindering commercial *cross-border transactions* in Europe[7]: entrepreneurs who offer their goods or services in other Member States are disadvantaged in comparison with competitors who are active solely on a domestic basis. Specifically, whereas the

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2 See on the following *Wagner* in: Koziol/Steininger, European Tort Law 2005, 651 ff; *Koziol,* Harmonizing Tort Law in the European Union: Advantages and Difficulties, ELTE Law Journal 2013, 73 ff.

3 *von Bar/Clive/Schulte-Nölke* (eds), Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (2009).

4 *European Group on Tort Law* (ed), Principles of European Tort Law. Text and Commentary (2005), hereinafter *EGTL,* Principles.

5 This question has already been asked frequently, especially in respect of tort law, see eg *Magnus,* Europa und sein Deliktsrecht – Gründe für und wider die Vereinheitlichung des ausservertraglichen Haftungsrechts, in: Liber Amicorum Pierre Widmer (2003) 221; *Wagner* in: Koziol/Steininger, European Tort Law 2005, 651 ff.

6 Cf *Zimmermann,* The Law of Obligations. Roman Foundations of the Civilian Tradition (1996); *idem,* Savignys Vermächtnis. Rechtsgeschichte, Rechtsvergleichung und die Begründung einer Europäischen Rechtswissenschaft, Juristische Blätter (JBl) 1998, 273; *idem,* Europa und das römische Recht, Archiv für die civilistische Praxis (AcP) 202 (2002) 243 ff.

7 Cf *von Bar,* Untersuchung der Privatrechtsordnungen der EU im Hinblick auf Diskriminierungen und die Schaffung eines Europäischen Zivilgesetzbuchs, in: Europäisches Parlament PE 168.511, available at <http://www.europarl.europa.eu/workingpapers/juri/pdf/103_de.pdf>.

domestic providers must simply gain information about the legal frameworks in their own country, the foreign provider is forced to find out about a legal system divergent from his own domestic law and to comply with such. This gives rise to transaction costs, which can prove to be obstacles to the market, especially for small and medium-sized businesses. The varying strictness of liability rules may, moreover, not only render access to the market more difficult but also have the effect of distorting competition as the liability rules in the land of origin will influence the calculation of costs. Less commercial areas – such as the liability of parents for their children or of those who keep animals – do not lead to direct distortion of competition. Nonetheless, these aspects also affect the single market indirectly via the liability insurance system.

8/5 However, even in cases solely involving the *law of damages,* the differences between the legal systems play an important role in everyday life. Let us take as an example a traffic accident that occurs near the border between Austria and Germany, involving two married couples, one Belgian and one German. Both drivers are injured and their respective spouses are killed. It may be of crucial interest whether the accident site was on the Austrian or German side of the border as in principle the law of the country where the accident took place is applicable[8] and the prerequisites for compensation claims as well as the contents and extent of such depend on the applicable law. This may be crucial because – as will be looked at below (no 8/266) – some legal systems do not provide for a no-fault based and thus strict liability for motor vehicles and furthermore differences exist not only with respect to the maximum compensation sums but also in relation to what constitutes recoverable damage. The claims for compensation provided for in national legal systems with respect to pecuniary damage arising from bodily injury or death, such as medical expenses, loss of earnings and other consequential losses but also and indeed to a greater extent the injured party's or bereaved party's claims for compensation of non-pecuniary harm, vary greatly[9]. In many European states (eg Austria, Belgium, France), people who lose a close relative in a traffic accident have a separate claim for compensation of pain and suffering directed at the compensation of the pain caused by said relative's death; this is independent of any health impediment the bereaved person themselves may have suffered (eg shock on hearing about the death). In several other EU Member States (eg Germany and the Netherlands), on the other hand, no such compensation for pain and suffering is recognised for such relatives. This may lead to very different amounts of compensation for pain and suffering for a victim's own injury but also to a bereaved victim being

8 Art 3 Hague Convention on the law applicable to traffic accidents; art 4 Rome II-Regulation.

9 See in more detail *W.V.H. Rogers* (ed), Damages for Non-Pecuniary Loss in a Comparative Perspective (2001); *B.A. Koch/Koziol* (eds), Compensation for Personal Injury in a Comparative Perspective (2003).

awarded compensation for the loss of a spouse that he would never have received at home or, vice versa, that a compensation claim cannot be asserted though it would have been a matter of course in the victim's domestic system.

8/6 It is not only in such everyday scenarios such as traffic accidents that the differences between the legal systems are so noticeable, however: the intensification of financial, work and private contacts within the EU means it is increasingly common that inhabitants or companies in one Member State are subjected to the rules of another Member State because they stay there, work there or – acting from their own state – »are active there«, whether by delivering goods, because of assets or mass media. The assessment of an injury according to another legal system may lead in many ways to unanticipated legal consequences since – as indicated in the reports on the different legal systems – there are considerable differences with respect to the prerequisites for claims and the legal consequences thereof, which may derive not only from fundamentally different value judgements in the law of damages but also from differences in the interaction between tort law and other rules, such as insurance and social welfare law.

8/7 As the question of *applicable law* is thus always of considerable importance in cases of damage involving another country, the frequent differences of opinion on the international private law connection often pose an obstacle to an amicable resolution of disputes and thus cause considerable legal costs. Harmonisation of European liability law could thus lead to a noticeable reduction of legal disputes and thus the consequential expenses of cases involving damage that have an international aspect. Last but not least, European citizens – who are encouraged to move around in the European Union – cannot be expected to be very understanding that, in the case of an accident, they are treated very differently depending on which legal system is applicable.

8/8 Bearing in mind all the negative aspects associated with international cases of damage due to the many different legal systems involved, it is natural to dream of a uniform law in the EU[10]. At present this is certainly still a dream which, however,

10 See on this topic – partly in English, partly in German – *Faure/Koziol/Puntscher-Riekmann,* Vereintes Europa – Vereinheitlichtes Recht. Die Rechtsvereinheitlichung aus politikwissenschaftlicher, rechtsökonomischer und privatrechtlicher Sicht (2008); further *Spier,* The European Group on Tort Law, in: Koziol/B.C. Steininger (eds), European Tort Law 2002 (2003) 541; *Faure,* How Law and Economics may Contribute to the Harmonisation of Tort Law in Europe, in: Zimmermann (ed), Grundstrukturen des Europäischen Deliktsrechts (2003) 31. On the importance of and different ways of harmonisation, particularly in contract law, see the article by *Kadner,* Die Zukunft der Zivilrechtskodifikation in Europa – Harmonisierung der alten Gesetzbücher oder Schaffung eines neuen? Zeitschrift für Europäisches Privatrecht (ZEuP) 2005, 523; *Grundmann,* The Future of Contract Law, European Review of Contract Law (ERCL) 2011, 490; *Magnus,* Harmonization and Unification of Law by the Means of General Principles, in: Fogt (ed), Unification and Harmonization of International Commercial Law (2012) 161; *Gomez/Ganuza,* An Economic Analysis of Harmonization Regimes: Full Harmonization, Minimum Harmonization or Optional Instrument? ERCL 2011, 275.

at least seems partly feasible, in particular for the law of contract[11] and possibly also for the law of damages[12]. Nonetheless, the question of whether this is a happy dream or a nightmare is still open.

II. Today's state of affairs

8/9 The European Union already advances the unification, or at least a harmonisation, of private law of the Member States, namely by way of *directives* and *regulations.* This is the case not only in the area of contract law[13] but also to some extent of tort law; the most important example in the latter area is the directive on product liability[14].

8/10 Furthermore, the *decisions* of the Court of Justice of the European Union (CJEU) contribute to harmonisation and sometimes create completely new rules – acting like a legislator. The most sensational example is the development of state liability: consumers, for example, have a claim against the state if it does not correctly implement EU directives which have a protective purpose in respect of consumers and a consumer suffers a loss therefrom. As a result, the state is liable even for the legislative acts of the parliament – a liability which was previously almost unknown in the Member States[15].

8/11 Last but not least, in the last years *academics* and *judges* have contributed in a less obvious way to the harmonisation of European private law[16].

8/12 Therefore, as realists we have to accept that the question is no longer whether we want harmonisation of law in the EU since it is already a fact which cannot be denied and we must come to terms with this development. Thus, what is on the

11 See in particular the Communication from the Commission to the Council and the European Parliament on European contract law of 11.7.2001, COM (2001) 398 final, Official Journal (OJ) C 255 of 13.09.2001, 1–44.

12 There are already two proposals for the future drafting of a European law of damages, one from the European Group on Tort Law (EGTL), which collaborates with the European Centre of Tort and Insurance Law (ECTIL) and the Research Institute for European Tort Law of the Austrian Academy of Sciences (ETL), and one from the Study Group on a European Civil Code (SGECC).

13 See the recent Proposal for a Regulation on a Common European Sales Law, COM (2011) 635 final; further, eg, Directive 2011/83/EU of the EP and the Council of 25 October 2011 on consumer rights [2011] OJ L 304 of 22.11.2011, 64–88.

14 Directive 85/374/EEC.

15 See on this topic with further details *Tichý* (ed), Odpovědnost státu za legislativní újmu. Staatshaftung für legislatives Unrecht (2012).

16 *L. Miller,* The Notion of a European Private Law and a Softer Side to Harmonisation, in: Lobban/Moses (eds), The Impact of Ideas on Legal Development (2012) 265 ff.

agenda is not whether there should be a harmonisation of the law, but rather *how* harmonisation should take place[17].

8/13 As to the quality of harmonisation, it must be said that in seeking to strike a balance, the European Union's attempts to harmonise private law have unfortunately produced extemely negative results: the respective directives or regulations of the EU cover narrowly defined areas[18]. Such *selective harmonisation* leads however to a *double shattering of the law*[19]*:* firstly, the national legal systems become infiltrated by foreign provisions; secondly, the EU's directives and regulations are not based on a consistent and *overall concept* and therefore are very often not in accordance with one another. Every directive of the European Union is a compromise between the varying national views and the outcome depends on national interests as well as the nationality and personality of the members of the Commission and the opinion of which legal system gets the upper hand over the other legal systems. All this is done without taking regard of a consistent overall system, which does not exist but would be imperative in order to aim at a legal system realising the idea of equal treatment and thus of justice. These isolated forays, highly unsuitable for harmonising legal systems, were probably fostered by the influence of common law under which one is accustomed to deciding from case to case, without taking into account other cases adequately in advance and thus also without even thinking of a coherent overall system[20]. The introductory remarks by *Green/Cardi*[21] are characteristic of this way of thinking: »While courts thus ›make law‹, they do so by way of decisions in individual cases that then are applied in subsequent cases. Courts must decide only the issues presented by the facts of the case before them and, in doing so, they do not engage in the sort of general and prospective lawmaking in which legislatures engage. Thus, while a court may decide to reject contributory negligence and employ instead comparative negligence, it would not then attend to the many consequential issues that must be addressed once a regime of comparative negligence is adopted. Those matters would be left to future development as they arise in cases and are presented to courts.«

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17 On this and the following with further details *Koziol,* Comparative Law – A Must in the European Union: Demonstrated by Tort Law as an Example, Journal of Tort Law 2007, 4 ff.

18 The investigations by *Koziol/Schulze,* Conclusio, in: Koziol/Schulze (eds), Tort Law of the European Community (2008) no 23/39 ff highlights, for example, that tort rules at Community level do not have much in common on a conceptual level and are solely created to provide remedies for an effective functioning of the Community in isolated areas.

19 Cf eg, *Hommelhoff,* Zivilrecht unter dem Einfluss europäischer Rechtsangleichung, AcP 192 (1992) 102; *Koziol,* Ein europäisches Schadenersatzrecht – Wirklichkeit und Traum, JBl 2001, 29; *Schwartz,* Perspektiven der Angleichung des Privatrechts in der Europäischen Gemeinschaft, ZEuP 1994, 570; *Smits/Letto-Vanamo,* Introduction, in: Letto-Vanamo/Smits (eds), Coherence and Fragmentation in European Private Law (2012) 3 ff; *Zimmermann,* Die Europäisierung des Privatrechts und die Rechtsvergleichung (2006) 13.

20 See on this also below nos 8/108 f and 140.

21 *Green/Cardi,* USA no 6/1.

If not only the courts should proceed by way of deciding individual cases but also the legislature takes a corresponding approach, it will be difficult to attain a consistent and thus fair overall system, in particular if this involves the harmonisation of legal systems with different legal cultures and divergent solutions as regards fundamental questions.

8/14 This criticism can be illustrated easily and objectively by the *directive on product liability,* the most important existing example of harmonisation in the area of tort law. This directive imposes a very rigorous strict liability regime on entrepreneurs for damage caused by defective products. But the reasons for establishing such liability are uncertain and it is open to debate whether this provision fits into an overall plan which takes regard of the whole area of liability of entrepreneurs. For example, why is liability for services not included and what about the relationship with other types of strict liability? Further: is it really reasonable that strict liability is provided for a carpenter if a stepladder breaks, as the ladder he made is a moveable good, but that an entrepreneur is not strictly liable if the bridge he designed collapses, as the bridge is not a moveable good?

8/15 Besides in the area of directives and regulations, the lack of a basic concept can also be observed in the case law of the Court of Justice of the European Community. An impressive example in tort law is the jurisprudence on *Member States' liability* for a violation of EU Community law[22]. The CJEU established a liability which resembles result-oriented liability which is independent of any misbehaviour of the state. As mentioned earlier, such liability is new to the legal systems of nearly all the Member States. Moreover, the Court has very strange opinions with regard to causation, which do not fit in with the approaches of most of the national legal systems in respect of this issue.

8/16 Further, it must be pointed out that not only those who design the EU's directives and regulations, but also the CJEU, have a deplorable lack of knowledge of fundamental functions, prerequisites, aims and legal consequences of the individual legal instruments and also of their interplay. In this connection, the awareness of the necessity that certain requirements have to be appropriately linked to *certain legal consequences* appears to be diminishing. For example: according to Directive 2007/64/EC on payment services, the payer's payment service provider has to refund to the payer the amount of a non-executed payment transaction in the case of liability (art 75). Although the wording gives the impression that the issue at stake is liability under the law of damages, astonishingly enough, fault

22 In more detail *Koziol,* Staatshaftung für die Nichtbeachtung von EU-Recht. Einige kritische Punkte, in: Tichý (ed), Staatshaftung für legislatives Unrecht 150 ff; *Schoisswohl,* Staatshaftung wegen Gemeinschaftsrechtsverletzung (2002) 273 ff; *Tietjen,* Das System des gemeinschaftsrechtlichen Staatshaftungsrechts: Eine Darstellung der Haftungsdogmatik vor dem Hintergrund der dynamischen Rechtsprechung des Europäischen Gerichtshofes (2010); *Dörr* (ed), Staatshaftung in Europa. Nationales und Unionsrecht (2013).

is not a requirement. Ultimately, this could be justified because in substance the provider's obligation is one under the law of unjust enrichment. However, if one accepts this, it seems quite unreasonable that art 78 rules that no liability at all exists in the case of abnormal and unforeseeable circumstances beyond the provider's control. Such grounds for exemptions are acceptable if compensation of imputable damage under tort law or under contractual liability rules is at stake but not under the law of unjust enrichment: irrespective of the reasons for non-execution, there is no justification at all for granting the provider the amount he should have transferred.

8/17 Another example is set by the CJEU: after the recent judgment in the case *Gebr. Weber* and *Putz,* the consumer's warranty claims independent of fault in cases of defective goods being delivered also cover the costs of disassembly of the defective item and assembly of the item delivered in replacement; other consequential loss sustained by the purchaser resulting from the defectiveness are, however, not covered by the warranty in the eyes of the CJEU. Since the costs of the disassembly of the defective item and the assembly of the replacement item are no longer part of the performance within the equivalence relationship, it is already wrong in principle to allow such costs to be covered by warranty rights as these are directed at bringing about the balance desired by the parties between performance and counter-performance[23]. The issue is not the rendering of the promised performance itself but who bears the consequential costs that first arise due to the defective performance and therefore there is no sufficient reason to impose the burden of such costs on the trader without considering any grounds for imputation, in particular fault. It must be emphasised that granting a no-fault based claim for compensation of the costs of disassembly and assembly, ie of the damage consequential to defectiveness, gravely flouts a fundamental concern of our legal system, specifically that legal consequences and the prerequisites thereof in terms of factual elements of the infringement must be proportionate: this is one of the prerequisites for a consistent overall system that complies with the principle of equal treatment and thus the fundamental concept of justice[24]. The case law of the CJEU also leads to a contradiction in value judgements, irreconcilable in that it only provides for no-fault based liability in respect of disassembly and assembly costs but not for all other losses consequential to defectiveness, for example, the disadvantages that arise before the defect is remedied due to the goods delivered or the thing in which the defective good is installed being unusable. No persuasive arguments can be found to support distinguishing between different types of loss consequential to defectiveness, resulting in serious disadvantages.

23 On this *F. Bydlinski,* System und Prinzipien des Privatrechts (Nachdruck 2013) 181 f; cf also *Hassemer,* Heteronomie und Relativität in Schuldverhältnissen (2007) 271 ff.

24 See *Koziol,* Basic Questions I, no 2/95.

8/18 In addition to all these deficiencies, it must be stressed that quite often the *quality* of the respective directives or regulations and also the judgments[25] *is deplorable,* as some of the individual provisions are not based on a convincing idea, and their concept is not understandable. This can once again be shown by the directive on product liability. The reasons given for this directive point out that entrepreneurs' liability must cover only defective goods which have been produced industrially. The idea behind this was that industrial mass production causes a special danger, namely the unavoidable risk of delivering defective products; it is the problem of the so-called »Ausreisser« or »runaways«. Even with utmost care it is not possible to produce only flawless goods or at least to withdraw all defective products from circulation. However, this idea would not justify establishing liability for defects caused by the products' design. But what is even worse, the final version of the directive does not take any regard of the above-mentioned reason given for strict liability and also includes defective products of craftsmen, landlords, farmers and artists. It seems highly problematic that a great part of the directive's provisions are in clear conflict with the only valid reason behind it which was explicitly stated at the beginning of the drafting process. Also, the lawmaker has never even attempted to justify the extended application of strict liability and it seems difficult to find any convincing arguments in favour of such broad and very strict liability – at least nobody has been able to come up with any.

8/19 All these shortcomings mean that the European legal systems are drifting away from a well thought-out, consistent system which follows the idea of equal treatment. *Pierre Widmer*[26] therefore rightly diagnosed that, in the area of tort law, the EU provisions are even more inconsistent than the national provisions and that there is no recognisable overall concept. As a result, Community tort law is a mere torso. Thus, the legal systems correspond less and less with *the fundamental idea of justice,* namely the principle of equal treatment.

III. How to proceed?

8/20 Of course, quite a significant number of the deficiencies could be avoided by taking more time and more care in designing directives as well as regulations and in drafting judgments. But there can be no doubt that unification and harmonisa-

25 *Lorenz,* Ein- und Ausbauverpflichtung des Verkäufers bei der kaufrechtlichen Nacherfüllung, Neue Juristische Wochenschrift (NJW) 2011, 2042, referred to the quality of the decision CJEU 16.6.2011, joined cases C-65/09 *(Gebr. Weber)* and C-87/09 *(Putz)* as terrible.

26 *P. Widmer,* Die Vereinheitlichung des europäischen Schadenersatzrechts aus der Sicht eines Kontinentaleuropäers, Revue Hellénique de Droit International 99 (1999) 52.

tion are awkward and run beyond this into fundamental difficulties[27]: national legal systems are part of the traditional culture of the respective countries and determine the social life in that country. A general European codification, or even the unification or harmonisation of some areas, could be a far-reaching break from tradition, although – as mentioned before – parts of the European legal systems, especially the law of obligations, are influenced by Roman law and thus correspond to some extent. Further, as many European legal systems developed independently from one another over centuries, largely diverging legal cultures and habitual ways of thinking have to be reconciled. Therefore, it will be time-consuming, strenuous, hard and to some extent frustrating to strive towards the goal of a *general consistent concept* for the harmonisation of European private law, something which is urgently needed as every community needs a fair and functioning legal system. Nevertheless, one should not condemn the EU as a whole or only complain about the situation and the difficulties, but try to improve the EU, to influence the harmonisation process and to overcome the hurdles. Therefore, the decisive question is how we can improve the quality of harmonisation of the legal systems of the Member States.

8/21 I am convinced that we can reach the goal of reasonable harmonisation or unification of tort law in the EU only by drawing up as a first step a new and consistent concept which is acceptable to all or at least to nearly all of the Member States[28]. Fortunately, as already mentioned, two working groups have already designed such tort law concepts; the European Group on Tort Law – which published its Principles of European Tort Law in 2005[29] – and the Study Group on a European Civil Code together with the Research Group on Existing EC Private Law (Acquis Group) – which designed a Draft Common Frame of Reference, presented to the public in 2008[30]. Although a highly important step forward has been made by drafting these concepts, it still seems necessary to address some basic questions of tort law in addition. When drafting the first concepts, it is of course not possible to discuss all the fundamental questions in desirable profundity. Nevertheless, there is a need to do this, as it is the fundamentals that ground the decisive

27 See on this *Wagner* in: Koziol/Steininger, European Tort Law 2005, 656 ff; *Koziol,* Rechtsvereinheitlichung auf europäischer Ebene aus privatrechtlicher Sicht, in: Faure/Koziol/Puntscher-Riekmann, Vereintes Europa – Vereinheitlichtes Recht 50 ff; *Grigoleit,* Der Verbraucheracquis und die Entwicklung des Europäischen Privatrechts, AcP 210 (2010) 363 ff. *W. Doralt,* Strukturelle Schwächen in der Europäisierung des Privatrechts, Eine Prozessanalyse der jüngeren Entwicklungen, Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 75 (2011) 260.

28 *Koziol/Schulze,* Conclusio, in: Koziol/Schulze (eds), Tort Law of the European Community (2008) no 23/67 ff.

29 *EGTL,* Principles.

30 *von Bar/Clive/Schulte-Nölke* (eds), Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (2009).

differences between juridical orders, and therefore a comprehensive review of the foundations of tort systems is required.

I am convinced that the aim of harmonisation will be attainable only by further intensive work on a *comparative basis*[31]*:* first of all, we have to know even more about the fundamental ideas of other legal systems to better understand each other and to explore the different legal cultures and the ways of thinking in other countries. By doing so we will recognise the common bases, receive many valuable incentives, will be inspired by alternative solutions and discover new tools for solving problems, become more open-minded for different ideas and increase the understanding of fundamental perspectives; we will learn which differences in legal culture we have to take regard of and will know which largely diverging habitual ways of thinking have to be reconciled. By these means we will also recognise the borderlines of acceptable harmonisation. **8/22**

But as to comparative law, it must be pointed out that the more different the foreign legal systems are, the more dangerous it is to draw inspiration from these systems. When I say »different« I not only refer to the differences in parts of private law, eg tort law, or the entire private law, but also to fundamental divergences in the whole legal systems[32], eg including the social security system or criminal law because they may have the greatest influence on tort law. **8/23**

IV. Different legal cultures[33]

A. General differences of the legal systems

First of all, one has to consider the differences between the English common law system and the Continental civil law systems: the characteristic feature of the Continental legal systems is that they are *codified,* in contrast to English *case law.* Even more important is that the concept of a Civil Code presupposes that the human **8/24**

31 See the recommendation by *Markesinis,* Comparative Law in the Courtroom and Classroom (2003) 157 ff. See also *Markesinis et al,* Concerns and Ideas about the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help), American Journal of Comparative Law (Am J Comp L) 52 (2004) 133.

32 Cf *Markesinis,* Comparative Law 167 ff.

33 The special issue of the Journal of European Tort Law (JETL) on »Cultures of Tort Law in Europe« is recommended: *Oliphant,* Culture of Tort Law in Europe, JETL 2012, 147; *Borghetti,* The Culture of Tort Law in France, JETL 2012, 158; *Fedtke,* The Culture of German Tort Law, JETL 2012, 183; *Andersson,* The Tort Law Culture(s) of Scandinavia, JETL 2012, 210; *Lewis/Morris,* Tort Law Culture in the United Kingdom: Image and Reality in Personal injury Compensation, JETL 2012, 230.

intellect is capable of capturing the underlying structure of the law and presenting it in a systematic and comprehensive manner.

8/25 As legal systems with both common law and codified law coexist in the European Union, lawmaking by the courts is juxtaposed with lawmaking by the legislature. Any harmonisation or unification of law can, however, ultimately only be achieved via statutory regulation; thus, English law would have to change fundamentally. Although even in the area of common law, statutory laws are increasingly frequent, above all due to EU regulations and the transposition of EU directives, this would still be a very considerable step; ie a fundamental change of the process of lawmaking. However, the difference would be smoothed over not only because even in common law systems statutory law is increasingly usual but above all because the law of damages in particular is a field in which judge-made law also plays a very important role due to the diversity of problems, technical and social developments and the unsatisfactory statutory bases in the Continental European legal systems[34].

8/26 However, as mentioned earlier, there are also quite significant divergences between the *»legal families«* under civil law, eg the Germanic and the Romance or Scandinavian, and even members within one legal family show fundamental differences. Let us take for example two German-speaking countries: the Austrian and the German Codes date from different times – 1811 and 1900 respectively – and therefore the Austrian Code is a product of the »Age of Enlightenment« whereas the German Code is strongly influenced by the theory of Pandectism, which is based on Roman law. The basic ideas have a lasting influence on the respective legal systems as a whole.

8/27 Also in respect of allocating the duties between the legislator and the courts there are significant differences not only between the common law countries – with the dominant role of case-law designed by the courts – and the Continental civil law countries, but also between the Continental civil law systems based on codifications. It is, for example, obvious that on the one hand the French Code civil, the Austrian Allgemeine Bürgerliche Gesetzbuch and also the Dutch Code prefer flexible general principles over detailed casuistic provisions, thus entrusting the courts to apply the provisions of the law to individual cases, and on the other hand the German Bürgerliche Gesetzbuch tends toward strict and detailed rules without enough scope for development.

34 *Hopf,* Das Reformvorhaben, in: Griss/Kathrein/Koziol (eds), Entwurf eines neuen österreichischen Schadenersatzrechts (2006) 18; *Jansen,* Codifications, Commentators and Courts in Tort Law: the Perception and Application of the Civil Code and the Constitution by the German Legal Profession, in: Lobban/Moses (eds), The Impact of Ideas on Legal Development (2012) 201f.

However, I do not intend to deal in any more detail with these general characteristics of culture which are well known, rather I want to embark on some differences in legal culture which are decisive for the design and development of *tort law.* **8/28**

B. The notion of tort law

Even setting this goal brings us, however, to a very basic problem, namely the issue of which field of law we are talking about in the first place. The meaning of the German word »Schadenersatzrecht« and the corresponding terms in other Continental European legal systems, on the one hand, and the usual name »law of torts« in the common law on the other hand, are extremely different and point to fundamentally different underlying concepts. This must be taken into account again and again in the following paragraphs[35], but so much can already be said: the *Continental laws of damages* are somewhat homogenous legal areas based on the relevant basic prerequisites and the resulting legal consequence, namely claims directed at compensation for damage. In contrast, *common law* proceeds on the basis of a multitude – approximately 70[36] – of individual *»torts«* with very different prerequisites but also completely different legal consequences. It is highly significant for our purposes here that by no means all torts require that damage has occurred and while »damages« are frequently provided for as a legal consequence, this is not always the case, as the law of torts equally well concerns claims for surrender of property, cease and desist injunctions and disgorgement of profits. Finally, damages too are of the most various types and by no means always directed at compensating damage. This applies rather only to »compensatory damages«, which are aimed at compensating damage, but not to restitutionary, exemplary or punitive, nominal or contemptuous damages. The »law of torts« is thus an extremely inhomogeneous area of law that only serves the compensation of damage caused to a certain extent, albeit a very great extent. Only the law of those torts that provide for compensatory damages thus corresponds to the law of damages in the German-speaking and the other Continental legal systems. Only within this context can parallels be drawn and ideas adopted. This does not seem to have been stressed enough hitherto but should be taken into account as broadly as possible in the following discussion. **8/29**

35 On this below nos 8/118 ff and 146; in more detail *Koziol,* Schadenersatzrecht und Law of Torts. Unterschiedliche Begriffe und unterschiedliche Denkweisen, Magnus-FS (2014) 61 ff; *idem, Schadenersatzrecht* and the Law of Torts: Different terms and different ways of thinking, JETL 2014, 257 ff.

36 See *Oliphant,* General Overview, England and Wales, in: Winiger/Koziol/B.A. Koch/Zimmermann (eds), Digest of European Tort Law II: Essential Cases on Damage (2011) 1/12 no 1.

C. The rule »casum sentit dominus« and the social security system

8/30 A further difference in culture: I begin my book, »Basic Questions of Tort Law from a Germanic Perspective«[37], by pointing to the rule *»casum sentit dominus«,* which derives from Roman law and expresses the idea that a person who suffers damage must in principle bear this damage himself. There must be particular reasons to justify allowing the victim to pass the damage on to another person. Thus, the accent is more on *corrective justice* than on distributive justice. At least the same is true for the United Kingdom[38]. France, on the other hand – differing from the other Continental European countries – emphasises a victim-oriented approach in tort law,[39] starting with the principle *»neminem laedere«*[40], and thus underlines the idea of *distributive justice.* According to *Askeland's* contribution to this project[41], solutions of distributive justice also enjoy broad support in Scandinavia. It is thought fair that one who has suffered damage should receive compensation.

8/31 These differences in tort law are less important in the area of personal injury because there they are levelled out largely by *social security systems.* This seems to be true for all EU Member States, at least for the German-speaking countries[42] as well as for France[43], Hungary[44], Poland[45], the Scandinavian countries[46] and the United Kingdom[47], in contrast to the much less exhaustive American social security system. Even though the varying cultures of compensation under tort law are adjusted insofar by social security systems, nonetheless the differences between the individual social security systems create astonishing differences in respect of tortfeasors' liability. The extensive compensation of victims in Scandinavia is achieved by overlapping tort law, in the area of personal injuries, to a large extent with rules of insurance and social security schemes; most impressive of all is that the legislator additionally abolished the social security institutions' right of recourse[48]. Therefore, with respect to personal injuries, the Scandinavian legal systems combine far-reaching compensation of the victim with the offender's far-reaching release from liability.

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37 Published in 2012.
38 *Oliphant,* JETL 2012, 156.
39 *Moréteau,* France no 1/1; see also *Borghetti,* JETL 2012, 158 f; *Quézel-Ambrunaz,* Fault, Damage and the Equivalence Principle in French Law, JETL 2012, 26 ff.
40 *Brun/Quézel-Ambrunaz,* French Tort Law Facing Reform, JETL 2013, 80 ff.
41 *Askeland,* Norway nos 2/2, 125. See also *Andersson,* JETL 2012, 216 ff.
42 Basic Questions I, no 2/74 ff.
43 *Moréteau,* France no 1/53 ff; *Borghetti,* JETL 2012, 164 f.
44 *Menyhárd,* Hungary no 4/44 f.
45 *Ludwichowska-Redo,* Poland no 3/36 f.
46 *Askeland,* Norway no 2/2 ff; *Andersson,* JETL 2012, 219 f.
47 *Oliphant,* England and the Commonwealth no 5/17 f; *Lewis/Morris,* JETL 2012, 232 ff.
48 *Askeland,* Norway no 2/32; *Andersson,* JETL 2012, 220.

Providing for the victim's extensive compensation for losses caused by personal injuries via social security systems decreases the urgency of providing comprehensive compensation under tort law. Therefore, the popular argument that the highest ranking protected interest deserves the most extensive protection by tort law no longer seems to hold true as another legal instrument, even easier for the victim to enforce, already makes sure of such protection. From the *victim's perspective,* in this area, intensive protection under tort law is required only as far as social security does not provide full compensation. Such loopholes probably do not concern the most important interests of the victim to the highest degree. Seen from the compensation aspect we, therefore, see that the conclusion that »the highest ranking interests deserve the highest degree of protection under tort law« is no longer convincing; rather, one would even have to say, in respect of the other protection mechanisms, that the opposite is true. **8/32**

Looking at the – in most countries broadly accepted – preventive effect of tort law[49], no problem arises as long as the social security system has the right to claim recourse from the tortfeasor. From the *offender's perspective* there is no change if there is only a replacement of the creditor (caused by shifting the claim from the victim to the social insurer). But if such recourse is abolished as under Scandinavian law, the question arises whether other legal instruments – eg criminal law – have to be strengthened in order to attain the required deterrent effect. **8/33**

These examples show that the *interplay* of tort law and social security law is of the highest importance when designing tort law provisions. These realisations may be of some influence when rating the EU's product liability rules – the EU's main contribution to the field of tort law. As, in the case of damage to property, only consequential loss is covered and only if the property was used mainly for private purposes, personal injuries is the predominant field of application. But this is – as we have just learned – exactly the area where victims enjoy extensive protection by the social security system and no urgent need for their additional protection by tort law can be diagnosed. Thus, one could say that the producer's strict liability is solely an advantage for social insurers who can claim redress. But even this is not true under those legal systems which abolish the recourse action against the offender. In addition: under those legal systems any preventive effect of the product liability provisions is also missing. Bearing all of this in mind, the question as to what reasons or – in others words – which elements of liability can justify such rather producer's strict liability gain importance and one begins to doubt whether there was really such an urgent need to impose strict liability on producers. **8/34**

49 See Basic Questions I, no 3/4 ff; *Koziol,* Prevention under Tort Law from a Traditional Point of View, in: Tichý/Hrádek (eds), Prevention in Law (2013) 135.

D. Fault-based and strict liability

8/35 Quite different legal cultures in the area of tort law itself can be recognised, eg, with respect to the acceptance of *strict liability;* this area is further interesting because of the interplay between tort law and the compulsory insurance system. In the area of strict liability, European legal systems show much more diversity than in other areas of tort law[50]. On the one hand, the scale begins with the very far-reaching French strict liability of the holder of a thing, the *gardien.* This strict liability is not based on the special dangerousness of plants or things but is independent of such ideas. This leads to astonishing results: a four-year-old child was sitting in the upper floor of a house on the windowsill drawing a picture with a pencil on a piece of paper. Unfortunately – in looking down – the child lost its balance and fell down still with its pencil in its small hands. The child was lucky as it fell on a pedestrian and not on the pavement but it injured the pedestrian with its pencil. The French court was of the opinion that the child is the *gardien* of the pencil and therefore strictly liable for the damage caused by the pencil. Perhaps in the middle is Germany's legal system; special legislation establishes strict liability for the keepers of a variety of dangerous things. England is at the other end of the scale; the English legal system is very reluctant to recognise strict liability.

8/36 The absence of any strict liability for motor vehicles is perhaps the most marked difference between English law and that of most European countries. The majority of European legal systems have introduced strict liability in this area and it is important to note that they have coupled their liability rules with the imposition of compulsory insurance schemes as well as compensation funds. Consequently, while dangers resulting from the object as such (which can move at high speed and cause substantial harm) certainly were considered by the legislators in those jurisdictions, an overall view supports the impression that *Israel Gilead's* following statement[51] is true not only of Israel but also of Continental Europe: »The absolute liability attached to motor vehicles has been designed and actually functions as a tool for channelling the burden of road accidents to insurers.« Therefore, at least some notion of loss-spreading amongst those who profit from traffic seems to justify strict liability in those countries. It must be noted that, insofar as strict liability is concerned, a common core only exists in a very small area, eg in the area of nuclear energy, where international conventions exist.

50 See in more detail *B.A. Koch/Koziol,* Comparative Conclusions, in: B.A. Koch/Koziol (eds), Unification of Tort Law: Strict Liability (2002) 395 ff.

51 *Gilead,* Israel, in: Koch/Koziol (eds), Unification: Strict Liability no 45.

E. Punitve damages and the aims of the law of torts

A further serious difference between the common law and Continental European legal systems exists: common law countries, especially the USA, but also – to a lesser degree – England, Ireland[52] and Israel[53], think highly of *punitive damages;* Continental European countries reject them[54]. This contrast stems from a fundamentally different way of thinking and from a focus on different aims of the law of torts. As already explained above (no 8/29), the law of torts in common law is an extremely heterogeneous area of law as the numerous torts cover different factual elements with widely varying legal consequences and by no means do they always serve the goal of compensation of damage caused. As a result, also in the law of torts, the door seems to be open to considering goals other than compensation of damage. From this point of view it seems to be unproblematic that common law legal systems underline the preventive function of tort law and allow the awarding of punitive damages, amounting to a multiple of the loss suffered by the victim. Nevertheless, such punitive damages do not comply with the idea of corrective justice, as they do not restore the plaintiff's loss but instead give him a windfall while disregarding the fundamental private law principle of bilateral justification[55]. Further, by accepting punitive damages under tort law one oversteps the borderline between private and criminal law and thus neglects criminal law's fundamental principles, namely eg nulla poena sine lege and rules on burden of proof[56]. **8/37**

It is astonishing that most Continental European lawyers seem to feel much less need for punitive damages, and thus less need to violate quite a number of fundamental ideas, than their colleagues in the USA and England. The reasons for this phenomenon may be certain differences between the legal systems[57]. It seems possible that, under US law, punishment under *criminal law* is of less importance than in Continental Europe[58]; this may even be true to a higher degree for the area of *administrative penalty law.* Thus there may be a greater need for punitive damages **8/38**

52 *Quill,* Torts in Ireland[3] (2009) 569 ff.

53 But *Englard,* Punitive Damages – A Modern Conundrum of Ancient Origin, JETL 2012, 18 ff, advocates a very restrictive approach to punitive damages: »the joining of ideas of retribution and deterrence into the compensatory process by means of punitive damages should be practiced only in exceptional circumstances and to a very limited extent«.

54 An overall view is provided by the country reports in *Koziol/Wilcox* (eds), Punitive Damages: Common Law and Civil Law Perspectives (2009); *Meurkens/Nordin* (eds), The Power of Punitive Damages: Is Europe Missing Out? (2012).

55 Basic Questions I, no 2/59 with additional references. This principle in this respect is also supported by *Weinrib,* Corrective Justice (2012), in particular 2 ff, 15 ff, 35 f.

56 On all these arguments see *Weinrib,* Corrective Justice 96 ff, and below no 8/157 f.

57 On the differences in general see *Magnus,* Why is US Tort Law so Different? JETL 2010, 102.

58 Cf *Sonntag,* Entwicklungstendenzen der Privatstrafe (2005) 348 ff.

in the USA than in Europe. But there are a number of other possible reasons which I cannot elaborate on here[59].

V. Different ways of thinking

8/39 When trying to harmonise European law it is necessary to consider the difficulties caused by the various ways of thinking which are very different and which developed to diverse levels in the various legal families[60]. Illustrative examples are the differences between the English, French and German ways of legal thinking[61], which can be seen when reading the country reports in this project.

8/40 The fact that English private law – and thus also the law of damages – is dominated by case law influences the way it is applied: English courts and other bodies applying the law begin with a search for decisions made on the same or at least similar facts in another case and focus on the decision of a single case. Continental European lawyers, on the other hand, begin with a general, *abstract rule,* which has been formulated by the legislator. The importance of this difference should not, however, be overestimated, as the law of damages is largely judge-made law after all in Continental European systems too.

8/41 This is compounded by the following: in the common law, too much emphasis would seem to be placed on how only case-by-case decisions are to be made and no *overall picture* is to be drawn. Even a glance at the overall descriptions of the law of damages indicates that this is true only to a limited extent, even for decisions on single cases. Above all this case-by-case view is ultimately not sustainable in reality if decisions are to be reached in a coherent, understandable manner and to satisfy the principle of fairness to the effect that the same facts should be treated the same and different ones differently. In this respect the following considerations, which have already been described in more detail elsewhere, are relevant[62]: if the bodies applying the law, in particular the courts, must decide on a case, it is ab-

59 See in more detail *Koziol,* Comparative Report and Conclusions, in: Koziol/Wilcox (eds), Punitive Damages 54 ff.

60 See *Ranieri,* Europäisches Obligationenrecht[3] (2009) 2 f.

61 See *Markesinis,* Judicial Style and Judicial Reasoning in England and Germany, Cambridge Law Journal 59 (2000) 294; *Markesinis,* French System Builders and English Problem Solvers: Missed and Emerging Opportunities for Convergence of French and English Law, Texas International Law Journal (Tex Int'l LJ) 40 (2005) 663. Cf further *Lundmark,* Legal Science and European Harmonisation, The Law Quarterly Review 2014, 68; *Perry,* Relational Economic Loss: An Integrated Economic Justification for the Exclusionary Rule, Rutgers Law Review 56 (2004) 719, who gives an interesting example in the area of pure economic loss.

62 See *McGrath/Koziol,* Is Style of Reasoning a Fundamental Difference Between the Common Law and the Civil Law? RabelsZ 78 (2014) 709 ff.

solutely clear from the beginning that an earlier decision is only applicable when its facts are identical. Any and all deviations from the facts at issue inevitably give rise to the question of whether the precedent set by an earlier decision, tailored to the facts of that particular case, is still applicable because the material elements of the facts are the same and any differences consist only in non-material points; or whether the material elements are different but nonetheless to be seen as equivalent; or whether the differences must lead to a different evaluation, ie the previous decision is not applicable, even by way of analogy. This determination can only be made in an objective, understandable way if the criteria used in the previous decision to arrive at the evaluation in that case are identified and it is established whether only immaterial elements of the facts deviate and the decision must thus be the same. If, however, there are differences in points which are not clearly insignificant, it must be considered whether the case should be treated in the same way. This can only objectively be affirmed if it is possible to draw a more general rule from the evaluation made in the previous decision, which also covers the factual elements now at issue, thus admitting of an application by analogy. If this is not the case, differences in the facts necessitate different evaluations. If the latter is the case, for lack of an applicable previous decision, the only remaining option is to look for rules on the basis of evaluations that are more general and can be derived from case law as a whole, which then can be applied to the facts at issue.

8/42 This shows that even in common law the elaboration of more general or even very general rules is inevitable if decisions are to be objectively coherent, comply with the principle of equal treatment and fit into a consistent overall system. The procedure is thus the same as in the Continental European systems, only often even more comprehensive as initially the more general rule must also be elaborated whereas on the Continent it is available in legal codes.

8/43 As the courts in the common law jurisdictions have thus far already fulfilled this task as a matter of course, since it is unavoidable, but not in full awareness of so doing, the only task is to increase awareness in this respect, to reveal this procedure openly and to develop it more comprehensively. There is no difference in principles, and therefore no fundamental difficulties must be feared in the context of a changeover to codified law. Thus, the difference might perhaps be reduced to the statement that in common law the emergence of more general rules tends to be somewhat neglected whereas in Continental European systems on the other hand, there is too much focus on the general rules and the individual features of the single case are sometimes neglected.

8/44 But as already mentioned there are even astonishing differences between the legal systems on the Continent[63]: Germans tend to adopt a very systematic way of

63 See *Borghetti,* JETL 2012, 179 f; *Griss,* How Judges Think: Judicial Reasoning in Tort Cases from a Comparative Perspective, JETL 2013, 247.

thinking and usually try to give a convincing reason for decisions at both the legislative and the judicial stages. The French legislator and the Cour de cassation almost never give sufficient reasons and therefore one never knows why a case is solved in a particular way and one never knows beforehand how the next case will be solved.

8/45 Nevertheless, we need a consistent overall concept at the European level which can serve as a signpost for future directives by showing the European Union how directives can fit into a consistent *overall system.* Such a concept can further stimulate national legislators in respect of the future development of their national legal systems and – perhaps – ultimately provide a basis for a future common European tort law[64]. As we need such a concept, we have to overcome all difficulties; this will be not easy, it will require much knowledge, time and patience, openness for ideas we are unaccustomed to, willingness to accept compromises and last but not least hard work, first of all on a comparative basis. If all show good will and cooperate in a reasonable fashion, we will reach the goal, maybe not an ideal concept on the first go, but at least the basis for further improvement.

VI. Method of designing the draft

8/46 When designing such a concept and when drafting provisions, different approaches can be taken. The European legislators have usually applied two different methods in this respect hitherto[65]: on the one hand, *firm, detailed rules,* and on the other hand, *general, elastic rules* which must be put into concrete terms by the courts[66].

8/47 The basic rules of tort law provide very good examples of the difference. As mentioned above, the German Civil Code, the Bürgerliches Gesetzbuch (BGB), clearly tends towards the first-named method of firm, detailed rules:

8/48 § 823 Abs 1 BGB: *»Whosoever unlawfully injures, intentionally or negligently, the life, body, health, freedom, property or other right of another person, has an obligation to the other person to compensate the resulting loss.«*[67]

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64 As to the different means of harmonisation and unification see *Taupitz,* Europäische Privatrechtsvereinheitlichung heute und morgen (1993).

65 As *Nolan,* Damage in the English Law of Negligence, JETL 2013, 260, points out, the common law system can be understood as a combination of these two approaches as it knows »nominate torts« and also the general principles of negligence liability.

66 See on the following *Koziol,* Tort Liability in the French ‚Code civil' and the Austrian ‚Allgemeines Bürgerliches Gesetzbuch', in: Fairgrieve (ed), The Influence of the French Civil Code on the Common Law and Beyond (2007) 261 ff; *idem,* Begrenzte Gestaltungskraft von Kodifikationen? Am Beispiel des Schadenersatzrechts von ABGB, Code civil und BGB, in: Festschrift 200 Jahre ABGB I (2011) 469 ff.

67 Translation by *Fedtke/von Papp* in: Oliphant/B.C. Steininger (eds), European Tort Law: Basic Texts (2011) 93.

The rules in the French Code civil and the Austrian Civil Code, the ABGB, both of which are almost 100 years older than the BGB, on the other hand, are formulated in a more general and elastic manner: **8/49**

Article 1382 Code civil: »Tout fait quelconque de l'homme qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.« (»Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.«[68]) **8/50**

The wording of § 1295 (1) ABGB is similar: *»Every person is entitled to claim compensation from the wrongdoer for the damage the latter has culpably inflicted upon him; the damage may have been caused by breach of a contractual duty or independently of any contract …«*[69]. **8/51**

The precise list of protected goods in *§ 823 (1) BGB* contains more information than is covered by the very generally worded blanket clauses in art 1382 Code civil and § 1295 (1) ABGB. However, the fact that the German legislator has ruled on far more details means that, due to the rigidity of the provisions, any wrong decisions of the legislator also have a more noticeable effect, besides which statutory rules are also more likely to become inappropriate due to social, technical or economic changes, while the indefinite scopes of the Code civil and the ABGB allow the courts room for manoeuvre in order to keep up with changes. **8/52**

Moreover, it must be noted that the German approach to formulating provisions has not led to *legal certainty,* one example being *pure economic loss.* Pure economic interests are not covered at all by § 823 (1) BGB. German jurists feel that this is too restrictive[70] and, therefore, have turned to § 826 BGB, the rule on liability in case of behaviour contra bonos mores and have overstretched this provision. For example, intentional interference with contractual relations is always considered to be contrary to public policy; therefore, in essence contractual relations are generally protected against intentional interference. In addition, § 826 BGB requires intent, but courts and scholars take a very broad-minded approach to the effect that gross negligence is equal to intent. **8/53**

Further, Germans also paved the way for claims on compensation for pure economic loss by expanding the area of contractual liability, in which context pure economic loss has to be compensated. Therefore, culpa in contrahendo and »positive *Forderungsverletzungen«* (violation of duties of care between the parties to a contract, even if the contract is null and void) have been declared to belong to the area of contractual liability although the relevant duties are not established by **8/54**

68 Translation by *Moréteau* in: Oliphant/B.C. Steininger (eds), Basic Texts 85.
69 Translation by *B.C. Steininger* in: Oliphant/B.C. Steininger (eds), Basic Texts 3.
70 *G. Wagner* in MünchKomm, BGB V[6] (2013) § 823 no 249.

agreement of the parties. German lawyers also use conjuring tricks to try to establish *»Verkehrssicherungspflichten«*[71] to protect pure economic interests.

8/55 It seems that German lawyers have become accustomed to all of these dubious manoeuvres because they have been indoctrinated since their legal childhood[72]. However, an outside observer gets a strong impression that because the code is so strict, our German colleagues end up trying to get around its provisions in rather illegal ways, by circumventing the statutes and by the famed *»Flucht in die Generalklauseln«* (escape into the blanket clauses) – the commentaries on the general clauses § 242 and § 826 BGB really speak volumes. Such – broadly speaking – illegal proceedings are a habit-forming drug and have led German courts and scholars to become accustomed to ignoring fundamental value judgements and decisions of the legislator without any sense of shame. All of this produces an astonishing result: the rather generous, even sloppy, Austrians respect their code to a much greater degree than the orderly Germans.

8/56 A lesson on legal policy ought to be drawn from this: if the legislator tries to restrict the courts' room to manoeuvre to an unreasonable extent with firm, detailed rules, it ultimately achieves the opposite effect and legal certainty results to a lesser degree than with more elastic provisions[73].

8/57 However, we must now take a glance at *§ 1295 ABGB* and compare its solution for pure economic loss with the equivalent German rule. At first sight, we see that this provision says nothing about the protection of pure economic interests. One can only infer that according to its wording it seems possible to claim compensation for pure economic loss as § 1295 rules that everyone is entitled to demand compensation of the person who did him harm by fault. Nonetheless, the decisive questions as to what extent pure economic interests enjoy protection and when causing pure economic loss violates a duty of care are not answered.

8/58 A glance at French tort law reveals how much room to manoeuvre is left by provisions like those of the ABGB on tort law: although the wording of the tort law provisions of the French Code civil is nearly the same as in those of the ABGB, French tort law is not only totally different from today's Austrian tort law, but is also very different from French tort law at the beginning of the 19th century on the same legal bases as today.

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71 The construct »Verkehrssicherungspflichten« has been described by *Markesinis/Unberath,* The German Law of Torts[4] (2002) 86, as follows: »whoever by his activity or his property establishes in everyday life a source of potential danger which is likely to affect the interests and rights of others, is obliged to ensure their protection against the risks thus created by him«.

72 Cf on the following *Koziol,* Glanz und Elend der deutschen Dogmatik, AcP 212 (2012) 9 ff, 60.

73 See *F. Bydlinski,* Juristische Methodenlehre und Rechtsbegriff[2] (1991) 533 f.

Such open provisions already pose problems in a national legal system, but even more so in rules which should unify European private law, because they will be interpreted in the individual Member States in very different ways as legal tradition in each country differs to quite some extent. **8/59**

I feel that a middle course would be reasonable and that, therefore, the *flexible system,* designed by *Walter Wilburg*[74] on a comparative basis, can give valuable support[75] and show how to reconcile the very different ways of drafting codes – eg in Germany on the one side and in France and Austria on the other side – which seem to be a formidable hurdle in harmonising European tort law[76]. **8/60**

Wilburg makes two fundamental observations[77]: first, he recognises the *plurality* of independent valuations and purposes inherent in large legal complexes. The law may thus not be understood, interpreted and applied from the perspective of a *single* guiding idea. However, this must not be allowed to lead to a discretionary jurisprudence of countless unpredictable ad hoc viewpoints that may be alternately observed or ignored in isolated decision-making processes. On the contrary: all basic guidelines inherent in a given area of the law have to be observed in the light of their specific interaction in certain types of cases, that is to say in a generalised context. *Wilburg* calls these independent fundamental values »elements« or »forces«; one could also say »factors« or »system-forming principles«[78]. The plurality and autonomous weight of *Wilburg's* principles clearly distinguish his theory from all attempts to explain and apply major areas of the law on the basis of any *single* fundamental idea. Such attempts always necessitate the over-emphasis of some basic values and purposes by means of fictional extension and the downgrading of others, despite their autonomous importance. *Wilburg* therefore opposes all attempts to provide monocausal explanations of tort law[79] based on exclusive principles such as fault. This view has already become widely accepted today: for instance, it is recognised that besides fault, above all a high degree of dangerousness deriving from things or actions is of decisive importance; having **8/61**

74 *Wilburg,* Die Entwicklung eines beweglichen Systems im bürgerlichen Recht (1950); *idem,* Zusammenspiel der Kräfte im Aufbau des Schuldrechts, AcP 163 (1964) 346 ff.

75 This is clearly the prevailing opinion in Hungary, see *Menyhárd,* Ungarn no 4/18.

76 See the reservations pointed out by *Brun/Quézel-Ambrunaz,* French Tort Law Facing Reform, JETL 2013, 80 ff.

77 *F. Bydlinski,* A »Flexible System« Approach for Contract Law, in: Hausmaninger/Koziol/Rabello/Gilead (eds), Developments in Austrian and Israeli Law (1999) 10.

78 On the relation between *Wilburg's* system and the ideas of the theory of principles, see *F. Bydlinski,* Die Suche nach der Mitte als Daueraufgabe der Privatrechtswissenschaft, AcP 204 (2004) 329 ff, as well as *idem,* Die »Elemente des beweglichen Systems«: Beschaffenheit, Verwendung und Ermittlung, in: Schilcher/Koller/Funk (eds), Prinzipien und Elemente im System des Rechts (2000) 9 ff.

79 See the similar view of *Englard,* Punitive Damages – A Modern Conundrum of Ancient Origin, JETL 2012, 1, 19 who points out: »The importance of the concept of complementarity in the normative context lies in the mutually restraining effect of the contrasting values«.

said that, economic circumstances, the gaining of profit and insurability may also play a role[80].

8/62 Aside from the plurality of principles in a major area of the law, the flexible system emphasises their *gradation;* in other words, the »comparative« character of the »elements«. The legal consequence in a specific case results from the comparative strength of the elements in their interplay. The elements thus exhibit a clear, multifaceted structure of »more or less«. In the case of colliding principles, a compromise must be found by determining priorities.

8/63 It is important to point out that regard must be had not only to the gradations of the relevant elements in establishing a legal consequence but also the possibility of grading the *legal consequences.*

8/64 Criticism of the flexible system is certainly justified insofar as the method must still be refined and the application improved. However, this criticism is very often also based on the misapprehension that the disciples of this system are aiming at rules as flexible, uncertain and hazy as possible. However, this is not true at all and therefore akin to defamation. The leading scholar of the flexible system, *Franz Bydlinski*[81]*,* underlines quite a different basic idea – I quote: »Insofar as there are typical, clearly comprehensible facts, also as regards the consequences of a rule, the requirements of legal certainty and pragmatism, ie in this context predictable and simple application of law, and moreover also fairness and equality, support adherence to the system of fixed rules and prohibitions within the legislative system. Also in cases where legal certainty is one of the particular aims of a law, there will be no (or at least very little) room for ›flexible‹ enclaves. A basically flexible law on bills of exchange, real property law, procedural or punitive law is certainly impossible.«

8/65 Due to the complexity of the problems and the variety of the facts in different cases, it is by no means always possible to design firm rules in private law[82]. But even then *Wilburg* is not in favour of formulating sets of merely discretionary rules which can be either observed or ignored altogether in the decision-making process at random; on the contrary. However, the flexible system offers a middle course between rules with firm and strict elements and vague general clauses: by

80 Cf *Koziol,* Basic Questions I, no 6/1 ff.

81 *Bydlinski,* Juristische Methodenlehre und Rechtsbegriff 534.

82 This is not always adequately taken into account in criticism, for example also of PETL, see for instance *Wagner* in: Koziol/Steininger, European Tort Law 2005, 666 ff. The use of very sketchy terms, such as »wrongfulness«, without listing relevant aspects to be weighed up against each other can lead in any case only to less definiteness and thus more uncertainty. Neither has anyone managed yet to establish a clear, fixed rule on compensation of purely economic interests; naturally it would neither be appropriate to determine that there is simply no liability for pure economic damage nor that there should generally be compensation. Hence the criticism remains rather unhelpful so long as it does not simultaneously manage to offer better solutions – which, however, has not yet been the case.

describing the decisive factors which the judge has to take into consideration, the legislator can reach a much higher level of concretisation and considerably restrict the discretion of the judge. As such, the decision of the court becomes foreseeable and understandable on the one hand and still allows regard to be had to the variety of facts in different cases in a guided manner, on the other hand. The interplay of the different factors, which may be present in different intensities, is decisive for the legal consequence.

8/66 One concluding remark: it is clear that the flexible system not only has special merits as regards the development of national laws but also in particular in respect of *harmonisation* of laws as it provides an appropriate way to satisfy two opposing claims to the greatest extent possible, namely by not merely setting up blanket clauses in dire need of more specification on the one hand, or rigid rules on the other, that cannot do justice to the multitude of individual cases and moreover hinder all adaptation to changed circumstances[83]. By stating the material factors to be taken into account by the judge, the system accomplishes a significant degree of specification, decisively limiting the discretion of the judge and rendering the decision foreseeable but also allowing consideration of the diversity of possible facts in a controlled manner. Thus, the flexible system is highly suitable for harmonising or unifying European law, as it offers a compromise between the German and the French/Austrian way of designing codes and as the factors deemed to be material in the various legal systems may be included and account can be taken of the variously weighted evaluations as far as possible[84].

83 On this *Koziol,* Das niederländische BW und der Schweizer Entwurf als Vorbilder für ein künftiges europäisches Schadensersatzrecht, ZEuP 1996, 587.

84 For more detail in respect of all of the above see *Koziol,* Rechtswidrigkeit, bewegliches System und Rechtsangleichung, JBl 1998, 619; *idem,* Diskussionsbeitrag: Rechtsvereinheitlichung und Bewegliches System, in: Schilcher/Koller/Funk (eds), Regeln, Prinzipien und Elemente im System des Rechts (2000) 311 ff.

Part 1 Introduction

I. The victim's own risk and shifting of the damage as well as insurance-based solutions

A. Comparative law review

8/67 In Basic Questions I (no 1/1 ff), I discussed how in the *German* legal family the person who suffers damage must also bear the burden of such, unless there are special reasons that make it justifiable to facilitate shifting the damage to another person. However, I also pointed out that in today's society there is an increasing perception that the individual must as far as possible be freed from every risk. This goal certainly cannot be achieved by – however generous – extension of the law of damages, as freeing someone from risk always requires – albeit sometimes very far-stretching – grounds for imputation which can justify shifting the burden of the damage from the victim to someone else. In the case of personal injury, however, social security systems have taken over the risks in a very extensive fashion independently of any grounds for imputation. The costs of these systems are by no means borne in full by the insured beneficiaries but to a large extent by the state and by employers. These social benefits, however, generally do not change the imputation of the damage under the law of damages as the social insurance institutions have rights of recourse against liable parties; there are, nonetheless, exceptions to this possibility of recourse under workers' accident insurance laws when it comes to slight negligence on the part of the employer causing damage to the employee; such exceptions are supported above all by the argument that the employer fully or partly pays his employees' social security contributions[85]. It is also noteworthy that the very emphatic efforts made towards the most extensive coverage of damage that has already been sustained seems to be the primary focus, although it would obviously make sense for a main goal of the overall legal system to be the hindrance of damage occurring in the first place.

8/68 In *Hungarian* law, the starting point is also that in principle the victim must bear his damage himself; nonetheless the situation in Hungary as described by

85 See Basic Questions I, no 2/75. More details are provided by *Karner/Kernbichler,* Employers' Liability and Workers' Compensation: Austria, in: Oliphant/G. Wagner (eds), Employers' Liability and Workers' Compensation (2012) 63 ff, 95 f; *Waltermann,* Employers' Liability and Workers' Compensation: Germany, in: Oliphant/Wagner (eds), Employers' Liability 274, 276 ff; *G. Wagner,* New Perspectives on Employers' Liability – Basic Policy Issues, in: Oliphant/Wagner (eds), Employers' Liability 567 f.

Menyhárd displays the same tendency towards expanding liability for damage[86]. One difference to the German legal family presented, however, is the stronger focus on the notion of preventing damage alongside the compensation principle. The social benefits that apply in the health area, like those in the German legal family, do not displace the law of damages since the tortfeasor's liability is maintained in the form of the social insurance body's right of recourse.

8/69 In relation to *Japanese* law too, the established starting point is that everyone must bear the burden of damage sustained due to his own behaviour or by chance himself[87]. Liability is extended here – as in many legal systems – by wide-ranging objectification of fault[88]. The damaging party is not relieved of liability by social security benefits here either as the insurers have rights of recourse against the responsible party, except against negligent employers since such pay insurance premiums[89].

8/70 Neither does *Oliphant*[90] express any doubt that all legal systems proceed on the principle of »casum sentit dominus« in his report on *English* law in which he points to the well-established rule of common law »let the loss lie where it falls«; this also ties in with the report by *Green/Cardi* on *US* law[91]. *Oliphant* also reports, however, on the tendency to extend duties to compensate. Concerns about this rule have led in common law to a social welfare system in the health sector[92] and to insurance-based solutions[93], at first mainly in the field of injury to workers[94], though in this field the insurance-based solution partly emerged alongside the law of damages and partly suppressed it; later these rules developed into further-reaching systems of social welfare. The availability of social benefits does not mean the injuring party is released from liability, rather compensation payments made by such are taken into account with respect to the corresponding social benefits or there will be rights of recourse[95]. A further extension of compensation pay-

86 *Menyhárd,* Hungary no 4/1 f. The no-fault based liability described in detail based on misleading someone by information or advice is clearly no longer provided for in the new law.

87 *Yamamoto,* Japan no 7/2 f.

88 *Yamamoto,* Japan no 7/515 ff.

89 See *Yamamoto/Yoshimasa,* Employers' Liability and Workers' Compensation: Japan, in: Oliphant/Wagner (eds), Employers' Liability 339 f.

90 *Oliphant,* England and the Commonwealth no 5/8 ff.

91 *Green/Cardi,* USA no 6/16.

92 *Oliphant,* England and the Commonwealth no 5/17.

93 *Oliphant,* England and the Commonwealth no 5/13 ff.

94 *Oliphant,* England and the Commonwealth no 5/14 ff; *Oliphant,* Landmarks of No-Fault in the Common Law, in: van Boom/Faure (eds), Shifts in Compensation Between Private and Public Systems (2007) 44 ff; further *Lewis,* Employers' Liability and Workers' Compensation: England and Wales, in: Oliphant/Wagner (eds), Employers' Liability 137 ff. For the USA in this respect *Green/Cardi,* USA no 6/19 ff.

95 See on this the critical considerations of *Wagner* in: Oliphant/Wagner (eds), Employers' Liability 570 ff.

ments outside of the law of damages has been provided for in some common law systems, eg in the United Kingdom in particular for victims of crime[96], as well as in Canada and Australia for victims of road traffic accidents. The general no-fault based compensation system in New Zealand is famous; this will be discussed further below.

8/71 *Moréteau*[97] does say that in *French* law no description of the law of damages begins by mentioning the principle that the victim must bear his damage but also that in fact this would seem to be the common premise. He then discusses the above-mentioned tendency to relieve the victim of any and all risks and also my criticism to the effect that this overlooks the undeniable fact that compensation payments to the victim do not eliminate the loss from the world but only shift it to someone else, ie there is merely a shift of the damage and someone else suffers a disadvantage from having to cover the loss. *Moréteau* agrees with this but only limited to within the pure law of damages context and points to how the situation is changed by contractual insurance policies and the social insurance systems: in this manner it becomes the exception that the victim bears the damage; thus, there is a shift from commutative to distributive justice. This is in line with the broadly accepted opinion that it is better for society when its members bear risks together and thus follow a model based on solidarity. He writes that this political decision has proven to be viable. *Moréteau* also points out, however, that this cannot excuse the excesses of French law when it comes to extending liability.

8/72 This addresses two aspects important in relation to French law: on the one hand, picking up on the last point, the over-extension of the law of damages, and on the other hand, the covering of risks – with emphasis on the notion of solidarity – by systems outside of the law of damages. The latter consist of contractual insurance and social insurance, which, however – apart from the field of injury to workers by the employer[98] – provide for rights of recourse against the responsible damaging party[99], so that in this respect the damaging party is not relieved of any burden. In relation to understanding the French system, it is important that »in a French perspective, at least for practical purposes, civil liability is no longer a central but a marginal mechanism«[100]. Also significant is the comment[101] that in France the task of deterrence is not ascribed primarily to the law of damages,

96 *Oliphant,* England and the Commonwealth no 5/19.
97 *Moréteau,* France no 1/1.
98 See *G'sell/Veillard,* Employers' Liability and Workers' Compensation: France, in: Oliphant/Wagner (eds), Employers' Liability 224 ff, 229 f: Workers' compensation institutions have a right of recourse against the employer solely when it is established that her/his fault was inexcusable or intentional.
99 *Moréteau,* France no 1/54.
100 *Moréteau,* France no 1/13.
101 *Moréteau,* France nos 1/7 and 68.

rather this function is associated more and more strongly with criminal law. This relates to the fundamental functions of the law of damages and the interplay between it and other fields of law, in which context considerable differences to the German legal family can be identified.

In contrast there is no such wide gap between French and *Scandinavian* law, **8/73**
the latter in fact even exceeding the French system when it comes to consideration of the interests of the victim. As emphasised by *Askeland*[102], while the Norwegian law of damages is also based on the principle of »casum sentit dominus«, nevertheless the notion of distributive justice has found broad resonance and that of commutative justice has been ever more displaced: primarily, it is considered important that the victim gets full compensation. Secondly, it is widely seen as justified that the party that caused the damage should also compensate such – naturally leading to wide-ranging imputation, inter alia, by expanding no-fault based liability.

In more recent times, insurance-based solutions and the social security net in **8/74**
Scandinavia have functioned alongside the law of damages to ensure very broad coverage of *personal injury* – but not, however, of other damage. Moreover, protection of the victim has been improved by the extension of compulsory liability insurance policies, which have largely eliminated the risk of not being able to enforce claims for compensation[103]. It is of exceptional interest that in Scandinavia the focus on the notion of compensation has led to a far-reaching release from liability for the injuring party at least in the field of personal injury: no right of recourse is granted to the social security bodies against the injuring party, unless such has acted with intention[104]. The fact that this takes away the deterrent function of the law of damages has clearly not featured loudly in the debate, as this is not considered in any case to be a function of the law of damages. On the other hand, this system prevents over-compensation of victims, namely by reducing the compensation claim against the injuring party in accordance with the social benefits received. This means that social security results in a considerable release from liability for the responsible injuring party and thus relieves such to a corresponding degree from the burden of the often very high claims for compensation in case of personal injury. Insofar as there is liability insurance, social security ultimately also relieves the liability insurance of its burden by taking over its function. Those covered by liability insurance, however, at least enjoy the advantage that they are sometimes freed from paying insurance premiums and these costs are shifted to

102 *Askeland,* Norway no 2/2.
103 *Beck,* Das patchworkartige System der Haftpflicht-Versicherungsobligatorien, in: Fuhrer/Chappuis (eds), Liber amicorum Roland Brehm (2012) 1 f; *Merkin/Steele,* Insurance and the Law of Obligations (2013) 256.
104 *Askeland,* Norway no 2/4, at FN 7.

the general public who finance the social security system[105]. Thus, the law of damages has been partly squeezed out of the field of personal injury in Norwegian law and ultimately only serves to complement the social security benefits[106].

8/75 *Polish* law diverges insofar only insignificantly from the Norwegian approach: as *Ludwichowska-Redo* reports[107], the principle of »casum sentit dominus« is not expressly mentioned in legislation but is in her opinion undoubtedly the basis of Polish law in this respect. However, Poland also followed the general tendency towards extending the protection of the victim: on the one hand, the report describes extension of liability, inter alia, by objectifying fault, basing claims merely on wrongfulness, the expansion of no-fault based liability and the greater recoverability of non-pecuniary damages[108]. On the other hand, the social security system covers personal injury, though it is particularly noteworthy that the social security insurer has no right of recourse in Poland either against the injuring party[109], except in respect of specific benefits paid out in cases of inability to work because of intentional injury[110]. Thus, in Polish law too there is – as in the Scandinavian legal systems – a partial suppression of the law of damages by the social benefits system. Moreover, the out-of-court compensation system[111], which can be chosen by the patient in the case of a medical error and ensures rapid compensation albeit limited as to amount, also suppresses the law of damages in that the patient must waive all rights to claims under the law of compensation in respect of all he receives from this system[112]; accordingly these claims to compensation are not transferred to the pillars of the compensation system.

B. Conclusions

1. The extension of liability under the law of damages

8/76 The tendency towards extending liability under the law of damages is highlighted in all the reports. It is without doubt desirable that the victim be afforded protec-

105 *Askeland,* Norway no 2/5.
106 *Askeland,* Norway nos 2/2 f and 6.
107 *Ludwichowska-Redo,* Poland no 3/1 ff.
108 *Ludwichowska-Redo,* Poland no 3/2.
109 Only in the case of intentional damage is there theoretically a right of recourse against the injuring party, see *Bagińska,* Medical Liability in Poland, in: B.A. Koch (ed), Medical Liability in Europe: A Comparison of Selected Jurisdictions (2011) 413 f; *Ludwichowska-Redo,* Poland no 3/36, at FN 77.
110 *Ludwichowska-Redo,* Poland no 3/36 f. Cf further *Dörre-Nowak,* Employers' Liability and Workers' Compensation: Poland, in: Oliphant/Wagner (eds), Employers' Liability 387.
111 *Ludwichowska-Redo,* Poland no 3/4; *Bagińska,* The New Extra-Judicial Compensation System for Victims of Medical Malpractice and Accidents in Poland, JETL 2012, 101 ff.
112 *Bagińska,* JETL 2012, 103.

tion as far as possible by having the disadvantages such sustained covered by the injuring party. Sometimes, however, the impression is given that the legitimate interests of the injuring party may be forgotten. It must be taken into consideration that every additional or increased compensation payment to the victim places the burden of additional compensation duties on someone else; every increase in the protection of one party necessarily leads to a greater restriction of another's freedom of movement[113]. Covering the compensation interest of the victim by means of the law of damages is, moreover, only justified in this respect insofar as *the victim is more worthy of protection* than the damaging party, ie insofar as there are sufficiently weighty grounds for imputation. Beyond such extent, the damage may only be covered by other means, in particular by distributing the burden of having to bear the damage. This may be achieved by shifting the burden of damage to the general public by means of compensation paid by the state or by distributing the damage among a large number of people via an insurance system.

Furthermore, it would seem that in the midst of efforts to extend compensation for damage already suffered, the primary task of the legal system comes too short in the debate[114], namely that of *preventing damage* in the first place through security measures. Compensation can no longer eliminate the damage, only shift it to someone else. *Van Boom/Pinna*[115] emphasise accordingly quite rightly: »Compensating injury that could be avoided at lower cost for society is always a second-best solution.« Therefore, especial attention should be accorded to preventing damage, not only by means of the deterrent effect of the law of damages and not only by means of private law, but in particular also via administrative law[116]. **8/77**

This extension of duties to compensate, that is apparent today, is increasingly accomplished – except in England – by recognising *liability independent of fault*[117], in particular that of the keeper of dangerous things. As this liability is based on recognised fundamental concepts and is generally perceived as leading to reasonable results, this is in principle not an alarming development. Nevertheless, the extension of liability independent of any wrongful action is problematic insofar **8/78**

113 On this *Picker,* Vertragliche und deliktische Schadenshaftung, Juristenzeitung (JZ) 1987, 1052; cf also *Yamamoto,* Japan nos 7/68 ff, 361 ff and 600 ff.

114 This does not apply apparently to France, see *Moréteau,* France no 1/7. Cf also *Schamps,* The Precautionary Principle versus a General Principle for Compensation of Victims of Dangerous Activities in Belgian Law, in: Koziol/B.C. Steininger (eds), European Tort Law 2004 (2005) 121 ff.

115 *van Boom/Pinna,* Shifts from Liability to Solidarity: The Example of Compensation of Birth Defects, in: van Boom/Faure (eds), Shifts in Compensation Between Private and Public Systems (2007) 180.

116 See on this also van Boom/Lukas/Kissling (eds), Tort and Regulatory Law (2007), in particular *Faure,* Economic Analysis of Tort and Regulatory Law 400 ff, 422 ff; and *Lukas,* The Function of Regulatory Law in the Context of Tort Law – Conclusions 452 ff.

117 This is stressed above all by *Moréteau,* France no 1/4. See also *Gilead,* On the Justification of Strict Liability, in: Koziol/Steininger, European Tort Law 2004, 28 ff.

as it is not openly laid out[118], thus rendering decisions inexplicable and making future judgments impossible to predict, manipulating facts and prerequisites for liability and meaning the grounds for decisions cannot be traced to applicable rules but are based on subjective evaluations. Also worrying, moreover, are open developments of the liability system if the rule-maker neglects fundamental considerations and imposes burdens on the injuring party that are no longer justifiable. How far such risks have already manifested or present an apparent threat is an issue that is addressed repeatedly when it comes to answering basic questions of the law of damages. Burdens on the injuring party that can no longer be objectively justified in the absence of weighty enough reasons for attribution should always be avoided and efforts should be made towards accomplishing any further coverage of the disadvantages suffered by the victim that is deemed necessary via distribution of damage by means of insurance systems or at least by the state – as is largely the case in France.

2. Liability law and the social benefits system

8/79 At this point it is time to look more closely at the more general question of whether and to what extent it is desirable to supplement or displace the law of damages by *social benefits.* It is certainly a fact that when it comes to personal injury, the law of damages in the European legal systems – unlike in the USA[119] – is supplemented in a substantial manner by social benefits or even – in particular in the field of workers' compensation[120] – superseded by such; in the medical field the debate about the introduction of a no-fault based compensation system has once again subsided somewhat[121].

8/80 The fact that such extension of the protection afforded is limited to the field of *personal injury* is justified, on the one hand, by the fact that this relates to the highest ranking personal good and, on the other hand, the victim's very existence is often threatened. When it comes to injury to the person, therefore, the victim ought to receive compensation for damage in all cases regardless of the cause of

118 See Basic Questions I, no 6/145.

119 See *Green/Cardi,* USA no 6/19; *Hyman/Silver,* Medical Malpractice and Compensation in Global Perspective: How does the U.S. Do it? in: Oliphant/Wright (eds), Medical Malpractice and Compensation in Global Perspective (2013) 475.

120 On this *Klosse/Hartlief* (eds), Shifts in Compensating Work-Related Injuries and Diseases (2007); *Oliphant,* The Changing Landscape of Work Injury Claims: Challenges for Employers' Liability and Workers' Compensation, in: Oliphant/Wagner (eds), Employers' Liability 524 ff, 556 ff; *Wagner,* New Perspectives on Employers' Liability – Basic Policy Issues, in: Oliphant/Wagner (eds), Employers' Liability 567 f.

121 On the proposals for such systems and their implementation see *Dute/Faure/Koziol* (eds), No-Fault Compensation in the Health Care Sector (2004); *Koch,* Medical Liability in Europe: Comparative Analysis, in: B.A. Koch (ed), Medical Liability in Europe 650 ff.

said damage. Eliminating the necessity to check the prerequisites for liability also significantly helps with the realisation of this second aspect, ie the prompt payment of compensation. However, as a rule this does not extend to full compensation but only enough to cover fundamental needs.

8/81 In the case of damage to property, the prerequisites for extending the protection are not met to the same extent; the pecuniary damage and also the need for protection are, besides this, very different from case to case so that it makes more sense to allow the potential victim him or herself to organise cover for the risks. Insofar there is basic consensus among the legal systems discussed here, but there are differences as regards the extent of social benefits in the case of personal injury, ie which costs are covered and the size of the compensation payments to be made in the case of personal injury.

8/82 However, the differences as regards the possibility for the institutions that pay out social benefits *to take recourse* against the injuring party, something which directly affects the law of damages, appear more serious. At least at first glance it would seem that in this respect there are diametrically opposed views on fundamental issues, making it hard to see how all EU Member States might agree on harmonisation in the matter.

8/83 An argument against any general pruning back of the right to take recourse is, above all, that this would displace the law of damages in the field of personal injury to the extent that it was covered by the social benefits, thus also substantially reducing its *deterrent function.* These cons would only be countered by a very small pro: doing away with the social security system's recourse against the injuring party would only result in very small savings in processing costs since generally the injuring party has third-party liability insurance – most personal injuries are caused in road traffic accidents – and the recourse claims between the social security institutions and the third-party liability insurers can be processed inexpensively due to agreements providing for lump-sum reimbursements[122].

8/84 However, precisely this connects up with an aspect that at the same time very substantially undermines the basic arguments against excluding the possibility of recourse: the great majority of injuring parties have third-party liability insurance – once again road traffic accidents must be borne in mind – so that even in the event that the social security institution takes recourse, such injuring parties do not ultimately have to bear the damage themselves, meaning that the deterrent effect has already been lost anyway in this respect. The residual deterrent effect

122 See in Basedow/Fock (eds), Europäisches Versicherungsvertragsrecht (2002), the country reports *Fock,* Belgium 289; *idem,* Netherlands 892; *Scherpe,* Nordland (Denmark, Sweden) 998; *Rühl,* United Kingdom and Ireland 1503; *Lemmel,* Austria 1106; further for Germany *Deutsch,* Das neue Versicherungsvertragsrecht[6] (2008) no 289 ff; for Austria *Schauer,* Das Österreichische Versicherungsvertragsrecht[3] (1995) 331 f.

that still exists when the liability insurer bears the damage, and which would be lost if recourse claims were precluded, consists merely in – insofar as there is any – consideration of the frequency of damaging events when calculating the premiums due for the liability insurance. Moreover, it must be considered that the injuring party would still be liable for any personal injury not covered by the social security benefit, in particular for non-pecuniary damage and the damage to property that usually also ensues[123]; thus, it would still be possible for this residual aspect to take into account the frequency of damaging events when calculating the premiums for the liability insurance. Besides this, it must be noted that the damage not covered by social security would retain the deterrent effect it otherwise had in full. Finally, it must be borne in mind on the pro side when it comes to excluding the possibility of recourse that the – in any case sometimes doubted[124] – deterrent effect of the law of damages is only an ancillary function of that field of law. Deterrence is primarily effected by criminal law, which often also applies when it comes to personal injury and – in particular in respect of road traffic incidents – by administrative penalties, which are completely independent of any recourse claim option.

8/85 Nonetheless, in the vast majority of cases even the European[125] and Japanese social security systems have *not* shut out the law of damages in the field of personal injury. Exceptions have, however, been made for one particular area, specifically injury to the employee by the employer; this is based above all on the fact that the employer pays all or part of the employee's social security premiums and thus discharges itself of liability – at least for slightly negligent injuries[126]. Even in cases where recourse against the injuring party – as in the legal systems of Scandinavia and Poland[127] – is precluded, this only leads to a partial displacement of the law of damages, namely to the extent of the social benefit provided for; the duty to compensate any damage exceeding this still remains unaffected. In none of the legal systems looked at in this project was the law of liability fully replaced either comprehensively or only for the field of personal injury by a general insurance-based solution and neither are there any serious efforts underway in these

123 However, this sort of dual lane system with social security and supplementary claims for damages is complex and not really to be recommended; see *Wagner,* New Perspectives on Employers' Liability – Basic Policy Issues, in: Oliphant/Wagner (eds), Employers' Liability 597 f.

124 See above no 8/67 ff the references to the German-speaking countries as well as to Hungary, England and Japan. See also the comparative law description by *Magnus,* Impact of Social Security Law on Tort Law Concerning Compensation of Personal Injuries – Comparative Report, in: Magnus (ed), The Impact of Social Security Law on Tort Law (2003) 280 ff.

125 This applies also in respect of French law which goes particularly far in taking account of the compensation of the victim, see *Moréteau,* France no 1/11.

126 See Basic Questions I, no 2/75; further above no 8/69.

127 Above no 8/74 f.

countries to do so; not even in the field of personal injury[128]. In the USA any state insurance-based solution is met by particularly intense resistance[129], with the notion of retributive justice above all seeming to play a major role.

When *Moréteau*[130] emphasises the benefits of an insurance-based solution[131], he is clearly thinking of a real insurance solution that does not – fully – eliminate the deterrence function, on the one hand because of claims for damage exceeding that covered by insurance and, on the other hand, by means of how premiums would be calculated and deductibles. However, this basically already corresponds largely to today's European systems. **8/86**

Only in *New Zealand* has a comprehensive, no-fault based state compensation system for personal injury cases been introduced[132], with this area of the law of damages being completely set aside, also incidentally as regards damage that exceeds the insurance benefit. The disadvantages mentioned by *Oliphant,* namely caps on compensation, loss of the deterrent effect[133] and a substantial burden on the state (as the tortfeasor is released from liability and the state has no right of recourse) were and continue to be regarded as less significant in New Zealand than the advantages: compensation independent of cause of damage, much cheaper implementation and also emphasis on the notion of community. **8/87**

The example from New Zealand has not managed to be so fully persuasive as to inspire imitation in other countries. This also seems understandable[134]: the limits on the amount of compensation for personal injury and thus the incomplete protection afforded to the highest-ranking good must be considered a major fault of this system. The argument that claim processing is inexpensive is relative when **8/88**

128 See *Oliphant,* England and the Commonwealth no 5/18.

129 *Green/Cardi,* USA no 6/16; the basic distaste for state interference is clearly expressed in the sentence: »State interference is an evil, where it cannot be shown to be a good«.

130 *Moréteau,* France no 1/8 ff.

131 *Moréteau,* (France no 1/9) also mentions the advantage that, with an insurance-based solution, in contrast to one based on the law of damages, the full compensation of the damage will not be frustrated by lawyers' fees falling due. This, however, does not concern a shortcoming of the law of damages but rather a not very appropriate solution as regards who bears the expense of a legal proceeding, which anyway will only be the case in the USA and could easily be eliminated without fundamental changes to the whole compensation system. Moreover, it must be remembered that even when claims are made to insurers, it is frequently necessary to involve a lawyer.

132 *Oliphant,* England and the Commonwealth no 5/22 ff; *Oliphant,* Landmarks of No-Fault in the Common Law, in: van Boom/Faure (eds), Shifts in Compensation Between Private and Public Systems (2007) 68 ff.

133 Very sceptical on this *Green/Cardi,* USA no 6/20, and *Oliphant,* England and the Commonwealth no 5/25 points out: »It must also be remembered that the scheme has had available to it a number of tools that it can employ to duplicate – at least to some extent – such incentive effect as tort possesses, for example, the experience-rating of levies and the variation of levies following audit of safety management practices«.

134 See Basic Questions I, no 1/10 ff.

it is also taken into account that property damage often goes hand in hand with personal injury and compensation for the former must still be pursued separately using the usual legal means according to the rules of the law of damages. The solution predominant in Europe, combining the law of damages with insurance systems, seems more favourable as it exploits the advantages of the social security system while avoiding the disadvantages associated with wholly discarding the application of the law of damages. The latter is, however, no longer true when pruning back the possibility of recourse against the injuring party leads to a partial suppression of the law of damages in the case of personal injury.

3. A mediatory solution for the combination of the law of damages and social security law in the case of personal injury?

8/89 The French tendency to *socialise damage* and the Scandinavian and Polish *displacement of the law of damages* in the case of personal injury, by excluding the possibility of recourse against the injuring party[135], stand in stark contrast to how the other legal systems retain the combination of social law and law of damages, ultimately leading to the damage being borne according to the principles of the law of damages. These two systems, the displacement on the one hand, and the combination on the other, give an impression of being irreconcilably juxtaposed. Nonetheless, it would seem possible, by further developing the Scandinavian model yet at the same time also developing the already existing approaches to injury to the employee by the employer, to arrive at a mediatory solution, which as far as possible retains the advantages of both systems while largely avoiding the disadvantages. This ought to be discussed in depth and could prospectively meet with some acceptance in Europe; due to the basic distaste for state regulatory interventions in the USA[136] acceptance is hardly likely in that legal system, however.

8/90 The traditional system of combining social security and the law of damages realises, on the one hand, the goal of firstly giving the victim access to fast compen-

135 Very general against the rights of recourse on the part of the party providing insurance against damage – and thus also the social insurer – in the case of slight negligence on the part of the injuring party turns from *von Goldbeck,* Grenzen des Versichererregresses, ZEuP 2013, 283. His proposal is not persuasive as this would ultimately lead to the insuree providing third-party liability cover to the injuring party by means of the former's premium payments. The attempts to counter this argument and the elimination of the deterrent effect of the duty to compensate by imposing upon the injuring party a duty to compensate for a part of the premium hardly seems appropriate since by these means the victim would have to bear the risks, efforts and expense of collecting a small contribution to the premium. Moreover, the boundary between slight and gross negligence, which it is barely possible to draw clearly, would acquire major significance and thus the enforcement of the victim's right would become dependent on aspects that are very difficult to assess.

136 See *Green/Cardi,* USA no 6/16.

sation payments on the basis of social security and independent of what caused the damage; these payments are usually limited, however, and thus do not achieve full compensation of damage; on the other hand, the possibility for the social insurance institution to take recourse against the injuring party means that the expenses accruing in this respect must be borne by the party who is responsible for them under the general rules of imputation. This means the victim's interest in fast compensation payment is not dependent on the fulfilment of strict criteria within the framework of the social security system and its inherent limitations and beyond this, the notion of commutative justice and thus the notion of deterrence are also fully accommodated.

8/91 However, it must be taken into account that the injuring party's duty to compensate will be covered in most cases by – voluntary or compulsory – *liability insurance* and that thus firstly, the social insurer's recourse will have only a very minor deterrent effect, dependent on a corresponding premium basis taking into account the risk of damage. Nonetheless, the notion of imputation of damage still has effect in that the responsible injuring party must pay the insurance premiums and thus must bear the *costs* of having cover against damage via the liability insurer.

8/92 On the negative side, *procedural costs* fall due twice because of the recourse proceeding between the social insurer and the injuring party's liability insurer. However, these are kept very low by the usual procedure (see above no 8/83) of using yearly, lump-sum payments of the expenses incurred by the social insurer for victims who bring compensation claims against injuring parties with liability insurance, so that no really urgent need for any simplification can be established.

8/93 The Scandinavian-Polish system, which of course offers the victim the same advantages as the conventional system, can also lay claim to a further advantage in that its basic concept of excluding recourse claims already eliminates the need for double payment of procedural expenses. However, the problem with this solution is that the *deterrent effect* provided by the law of damages is completely shut off due to the lack of a claim for recourse by the social insurer against either the injuring party or the liability insurer; neither can this be maintained at least indirectly by means of risk-adjusted premium payments. It is worrying that the injuring party – unlike in some legal systems the employer in the field of workers' accident insurance[137] – must not even bear the costs of covering the damage via correspondingly calculated insurance premiums paid to liability insurers, but instead such costs are passed on to the general public; and since social security is damage insurance, thus to the whole group of potential victims[138].

137 See *Engelhard,* Shifts of Work-Related Injury Compensation. Background Analysis: The Concurrence of Compensation Schemes, in: Klosse/Hartlief (eds), Shifts in Compensating Work-Related Injuries and Diseases (2007) 74; *Wagner,* in: Oliphant/Wagner (eds), Employers' Liability 567f.

138 This is also emphasised by *Askeland,* Norway no 2/5.

8/94 As far as the worries regarding the lacking deterrent effect of the Scandinavian-Polish system are concerned, it can conversely be pointed out that in any case it is often doubted whether the law of damages really has such effect anyway[139] and that any effect in existence would in any case be substantially reduced by the availability of voluntary or compulsory liability insurance. Finally, it can be argued that in the field of personal injury the injuring party is still threatened anyway to a large extent by the possibility of having to pay compensation firstly for the victim's pecuniary harm not covered by social security, but above all also for the victim's non-pecuniary damage, which is not covered by social security, as well as very often the application of criminal law that has a definite deterrent effect. These arguments certainly have their justification but it must nonetheless still be considered that criminal law does not always apply and that the law of damages hitherto has still managed to have a certain deterrent effect, even despite the existence of liability insurance cover, when the premium system is designed accordingly and the injuring party must thus anticipate, in addition to criminal penalties, a financially noticeable response to his injuring conduct.

8/95 Above all, however, these arguments concerning deterrence cannot refute one major objection to the preclusion of recourse claims and thus against releasing the injuring party from liability: the pruning back of the right to recourse, and thus ultimately having the damage covered by social security, means the responsible injuring party *no longer* even has to bear the *costs of a liability insurance policy* to the extent corresponding to the liability risk. Insofar as such party has in fact liability insurance cover, when the premiums for this are calculated it is no longer the damage that is ultimately borne by the social security system – ie without recourse against the injuring party – that is taken into account since there is no liability risk in this sense. On the other hand, it seems very dubious that especial attention is paid to the fact that the social security system has no means to take recourse in the above cases and thus must ultimately bear the cost of all personal injuries. In any case, the contributions paid for social security are not assessed according to the rules applicable for liability insurance but according to the principles of social security insurance, so that in this respect those with social security insurance do not pay amounts proportionate to liability insurance cover based on the risk of damage.

8/96 In order to arrive at the appropriate solution that the responsible injuring party – like the employer in the field of workers' accident insurance – must at least bear the costs of the insurance for the liability risk he realises, it is necessary to bear in mind the function of a social insurer, all of whose rights of recourse against the injuring party or the liability insurance of such have been cut

139 See Basic Questions I, no 3/5.

off: as *Askeland*[140] emphasises, and as has also been stressed in respect of the field of workers' accident insurance[141], social insurance in such constellations is really general compulsory *liability insurance* for personal injury to the benefit of the injuring party. However, it cannot be objectively justified that each and every burden or at least every risk-appropriate burden corresponding to a liability insurance policy be taken from the party responsible for the damage and shifted to the general public, as social security is financed by the contributions from employers, income-dependent fees from those insured and by the state[142]. This also fails to take account of the notion of commutative justice in any remotely adequate manner.

8/97 Therefore, it is necessary that in respect of covering imputable damage special regard be had to the second function of social insurance – ie compulsory liability insurance created by precluding the possibility of taking recourse except in the case of intention – and to treat it accordingly too: insofar as in fact the issue is general, compulsory liability insurance in favour of the responsible injuring party, such must also bear the costs in proportion to the risk. This certainly cannot be achieved by somehow increasing the social security contributions for all insurance-holders, employers and the state, since this would mean – unlike in the case of a liability insurance – that neither the completely different liability risks of the variously hazardous activities or the individual liability bases can be taken into account. However, it is at least a step in the right direction when, for example, in Norway contributions must be paid to social security insurance providers in the field of motor vehicles and employer's liability insurance[143]; nonetheless this is not sufficient because it does not cover all potential liable parties that get the benefit of the »social liability insurance«, instead two important groups are picked out. In respect of the sub-field of »social liability insurance«, however, it would make sense, as in contractual liability insurance, to *base premiums payable upon the risk* in order to ensure that the parties responsible for damage according to the rules of the law of damages must pay in proportion to the size of the liability risk they created. This would maintain the residual deterrent effect as in the system conventional today.

8/98 Put in other words, it must be taken into account that the social insurer in reality performs two functions: on the one hand, the provision of traditional damage insurance in the interest of the sick and injured parties; on the other hand, the provision of *liability insurance* in the interest of the damaging party, who causes personal injury in an imputable manner. These two different insurance functions

140 *Askeland,* Norway no 2/7.

141 *Deinert,* Privatrechtsgestaltung durch Sozialrecht (2007) 267 ff; following his line Basic Questions I, no 2/75; for Japan likewise *Yamamoto/Yoshimasa* in: Oliphant/Wagner (eds), Employers' Liability 340.

142 *Askeland,* Norway no 2/5.

143 *Askeland,* Norway no 2/7.

also necessitate different premium bases in order to appropriately take account of the different risks. The fact that both insurance functions are to be taken on by one institution ought therefore not to change anything about different premium calculations bases since it is only a combination of different tasks in one institution that is at issue.

8/99 Given all of this, precluding recourse by the social insurer against the injuring party and any liability insurer covering such would no longer be problematic in any way and would only have advantages in that the costs of double processing would be avoided. However, it would become more complicated for the social security provider to calculate the contributions.

8/100 It ought to be considered whether ultimately it would not be even more pragmatic and cost-effective to entrust »social liability insurance« to the insurance companies in order to relieve the social security providers of the burden. In order to attain really blanket coverage of social insurance, contractual liability insurance for everybody would have to be compulsory. The wide distribution of the burden would mean it could be provided cheaply. Recourse by the social security providers against the liability insurer could also be organised as lump-sum payments, for which there are already tried-and-tested procedures to serve as an example.

8/101 As the general rules of imputation under the law of damages are not cast aside by this system, which instead only sets out a general liability insurance, some important questions must still be considered in the necessary debate on the introduction of a general »social liability insurance«. Of particular importance would be to what extent the *cover* provided under the liability insurance should extend; present-day social insurance does not offer complete compensation of personal injury; contractual liability insurance, on the other hand, is always subject to maximum limits. If this system is retained, this will serve to uphold the deterrent effect because, when damage runs into larger amounts, the injuring party's liability becomes relevant once again but, on the other hand, it means that, precisely when there is particularly extensive damage, the compensation must be paid out of one's own assets so that in particular when very serious damage is concerned, the victim would have to bear the risk of whether compensation would be paid and must expect quite often not to receive full compensation. This would thus mean retaining today's inconsistent system to the effect that both injuring party and victim are fully covered in cases of more minor damage, but not when they are affected particularly seriously. Besides this, it must be taken into account that the limits as to the compensation payable by insurance or also in relation to the recoverable damage means that the victim must additionally assert claims under the law of damages in order to achieve full compensation. This would not be a

desirable system, as *G. Wagner*[144] rightly emphasises in respect of workers' accident insurance designed in this manner: »The bargain offered by workers' compensation systems is to balance a more generous liability rule by rather parsimonious quantum rules and by savings in the form of administrative costs. The balance between these cost items is disturbed, and any savings in administrative costs are wasted if victims are allowed to sue the employer in civil court for complementary damages. In fact, such a two-layered system represents the worst of all worlds because it burdens society with the administrative costs not of one but of two sets of compensation mechanisms.« This expensive – also for the victim – coexistence of insurance cover and claims for damages can only be largely avoided if the compulsory liability insurance covers at least all personal injuries – even non-pecuniary injuries; nonetheless damage to property would still have to be actioned separately. However, any unlimited insurance cover would certainly also be problematic, though at least the general duty to take out liability insurance would mean very inexpensive insurance cover could be offered even for very high sums of liability: besides this, only the more extensive voluntary cover would remain unresolved. It ought to be examined, therefore, whether it would be possible to offer unlimited cover or whether at least the maximum amounts of cover can be set so high that they would in any case still cover foreseeable damage.

Furthermore, it ought to be considered how, if *premiums were calculated depending on risk,* that incentive peculiar to the law of damages, the avoidance of damage, would be retained[145]. Ultimately it is important not to neglect the option to take partial or full recourse if the injuring party is no longer worthy of protection, ie in particular in the case of intentional and especially inconsiderate infliction of damage, but also if the injuring party has derived advantages from his damaging behaviour. **8/102**

144 *Wagner,* in: Oliphant/Wagner (eds), Employers' Liability 597 f.

145 On this *G. Wagner,* Tort law and liability insurance, in: Faure (ed), Tort Law and Economics (2009) 389 ff.

II. Strict limits and rigid norms or fluid transitions and elastic rules?

A. Comparative law review

8/103 Not all country reports comprehensively discuss strict delimitation of the bases for claims in order to distinguish between absolutely protected and unprotected interests, the all-or-nothing principle or the advantages of elastic rules. This is likely due to the lack of a corresponding debate on the principles. However, at least some important aspects are addressed and besides this, the problems do come in for discussion in the context of some individual questions; they are then discussed accordingly in respect of such.

8/104 *Menyhárd*[146] emphasises with respect to Hungary that there is a tendency towards more open rules that allow the courts room for discretion in reaching their decision and the recognition of a flexible system. He differentiates between the necessity to distinguish clearly between the individual legal concepts and the affirmation of fluid transitions and gradations. He also stresses that a strict distinction between absolutely protected and unprotected goods is alien to Hungarian law, but that regard will be had to the ranking of the respective goods. The »all-or-nothing« principle is theoretically recognised but not implemented in practice, especially due to the recognition of partial causation, ie only in respect of certain parts of the overall damage.

8/105 In respect of France, *Moréteau*[147] emphasises, however, the tendency towards flexible solutions, as regards the extent of the compensation as well as the disinclination towards strict delimitation, for example between contractual infringements and delicts or between absolutely protected and unprotected interests as well as with respect to all-or-nothing solutions, which also leads to increased support for a reduction clause[148]. This openness towards flexibility is certainly discernible but contrasts with the foreign observer's impression that – unlike other legal systems – French law is often lacking in a readiness to differentiate, which is essential for flexible solutions. This applies in particular in respect of the *principe d'équivalence,* which promotes equivalence between the different kinds of fault and the prejudices suffered or interests protected; as a consequence »French law is said to assume that any licit interest deserves protection and that all such interests deserve equal protection«[149]. This does present a counter-position rejecting

146 *Menyhárd,* Hungary no 4/13 ff.
147 *Moréteau,* France no 1/14 ff.
148 *Moréteau,* France no 1/11.
149 See on this *Quézel-Ambrunaz,* Fault, Damage and the Equivalence Principle in French Law, JETL 2012, 21, 39, this author advocates relaxing this principle.

strict delimitation between absolutely protected and unprotected goods but is just as rigid as that position.

8/106 The Norwegian law of damages is based – as *Askeland*[150] explains – mainly on general principles, of which only a few are laid down in statutory law. The legislator very deliberately allows the courts a very wide margin of discretion, because the law of damages is »the law of the unexpected events« and thus it is not always possible to have clear rules in advance. Extensive areas are therefore structured by the case law of the Supreme Court, which is binding upon lower courts. The statement that: »On principle, one might say that the Norwegian system to a large extent features possibilities of reaching proportionality between the prerequisite of a legal rule and the effect of the rule« is important. Surprisingly, *Askeland*[151] sees the rigid all-or-nothing principle as the inevitable consequence of the causation theory and as anchored solidly in Norwegian law. However, this is somewhat in conflict with the existence of a reduction clause and the consideration of contributory fault that leads to apportionment of the damage[152].

8/107 *Ludwichowska-Redo*[153] emphasises that the all-or-nothing principle is adhered to in Polish law and partial liability in cases of alternative causation is not recognised. Furthermore, not only are strict boundaries widely acknowledged between the individual legal fields but also between contract and delict as well as between fault liability and liability based on dangerousness. *Ludwichowska-Redo* shows, nonetheless, that interim gradations can certainly also be detected in this respect, as in the case of culpa in contrahendo, or at least exist since, for example, fault-based liability and strict liability both have various gradations and converge towards each other, for example by the objectivisation of fault. In Poland, clear, firm rules are ultimately preferred, however – as in Germany, for instance – they are supplemented by very general and thus undefined general clauses. The flexible system is in any case unknown and due to the difficulty associated with its implementation, there would seem to be considerable impediments to recognising it.

8/108 The outsider would assume common law to incorporate a certain inherent flexibility, since after all individual decisions do not set out strict, general rules. *Oliphant*[154] emphasises, however, that »the nature of common law systems – where the judge is the prime mover of legal development, not the legislator – has meant that judges attach particular importance to certainty as they create, apply and develop ›case law‹. The doctrine of precedent *(stare decisis)* is perhaps the most obvious product of this philosophy.« Nevertheless, this must ultimately only mean

150 *Askeland,* Norway no 2/12.
151 *Askeland,* Norway no 2/17.
152 *Askeland,* Norway no 2/18.
153 *Ludwichowska-Redo,* Poland no 3/81 ff.
154 *Oliphant,* England and the Commonwealth no 5/7; however, cf also no 5/29.

that the rule relating to an individual case must be formulated as clearly as possible. Since, however, it is unlikely that such rules will lead to a closed, overall system, enough room for discretion must remain in order to elaborate the differences between the different cases and the extent to which previous decisions do not apply and, in further developing the position, come to a diverging rule. Moreover, *Oliphant* stresses that often a certain amount of arbitrariness must be accepted in that more or less undefined rules are set out and moreover a flexible approach can be discerned, for example in recognising partial liability in the case of contributory responsibility or uncertain causation as well as »policy considerations« when determining the duties of care.

8/109 For the US system, the rules are also characterised of course by their foundation in individual cases. *Green/Cardi*[155] clearly explain why the differences between, but also the interplay of, the different legal fields are hardly discussed and seen just as seldom: »›The Law of Obligation‹ is not a common phrase in US law, and students are taught in separate courses with separate texts and separate professors the law of contract and the law of tort.« This is of course anything but helpful when it comes to developing a consistent overall system that strives towards equal treatment and thus it should not be seen as a model when it comes to unifying EU law. That said, the »all-or-nothing« principle has increasingly disappeared from US law[156].

B. Conclusions

8/110 As far as the *delimitation* between the different *bases for claims* is concerned, the two viewpoints, namely on the one hand that these must be differentiated strictly, and on the other, that there are fluid transitions, can – as *Menyhárd* aptly argues – very well be combined[157]. This may at first seem puzzling but they are reconcilable precisely because they address different aspects[158]. On the one hand, it cannot be denied that individual legal fields or instruments are intended in part to fulfil different tasks, in part provide for different legal consequences, and accordingly also set out different prerequisites. To this extent, clear delineation not only makes sense, it is necessary in order to understand the legal system as a logical whole. In this sense both criminal law and the law of damages as well as the law of unjust enrichment aim at the protection of legal goods. However, criminal law does

155 *Green/Cardi,* USA no 6/15.
156 *Green/Cardi,* USA no 6/22.
157 See above no 8/103 ff.
158 This may not have been emphasised enough in Basic Questions I, but at least it is addressed in no 1/22.

this by implementing the notion of deterrence by providing for penalties, the law of damages does it by imposing a duty to compensate the damage caused and the law on unjust enrichment by ordering a disgorgement of the enrichment unjustly acquired[159]. The gravity of the legal consequences provided for decreases in the same order[160], and likewise the prerequisites become accordingly less weighty and range from the subjective blameworthiness of the precisely described interferences with protected goods to merely objective realisation of interference in third-party goods, without fault or even duties of care being relevant. Likewise, within the field of the law of damages, in its core the fault-based liability based on misconduct can very clearly be distinguished from the strict liability that can be incurred merely by the permitted use of a source of high danger[161]. The grounds for imputation are thus very different and accordingly, fault-based liability serves commutative justice and liability based on dangerousness, on the other hand, distributive justice. This necessarily clear separability, however, should not blind one to the fact that interim forms of liability have already been elaborated[162] and naturally even more may be created, though the question does arise whether and how the rules of the legal fields between which the *hybrid form* is positioned should be combined to make a consistent overall system. The fact that such hybrid forms exist can be demonstrated in most legal systems and is ultimately also recognised in respect of the field of fault-based/strict liability too[163]. To this extent, it should be possible to achieve consensus.

8/111 It is understandable that the rigid distinction advocated in German law between *absolutely protected and unprotected interests*[164] finds no support either in French law[165] or in certain other legal systems[166], as in reality there are no goods with completely unrestricted protection and neither is there any legally recognised interest that enjoys absolutely no protection, for example not even with respect to being damaged intentionally or even contra bonos mores; even purely economic and non-pecuniary interests enjoy limited protection after all. On the other hand, neither is it astonishing that the French *principe d'équivalence* is met with very considerable scepticism in other legal systems as it is very obvious that

159 Basic Questions I, nos 2/84, 49 and 25 f.
160 On the fact that the surrender of inadmissibly acquired advantages is the least onerous of these, see Basic Questions I, no 2/27.
161 Basic Questions I, no 1/21.
162 On the interim area between fault-based liability and liability based on dangerousness, see Basic Questions I, no 6/188, on that between contractual breach and delict see Basic Questions I, no 4/1 ff.
163 See *Ludwichowska-Redo,* Poland nos 3/10 and 119; further *B.A. Koch/Koziol* (eds), Comparative Conclusions, in: B.A. Koch/Koziol (eds), Unification of Tort Law: Strict Liability (2002) 395 ff, 432 ff.
164 See Basic Questions I, no 1/24.
165 *Moréteau,* France no 1/16.
166 See for example *Menyhárd,* Hungary no 4/16; cf also *Yamamoto,* Japan nos 7/20 and 84.

all legal systems have a hierarchy of legally recognised and protected interests[167]. The different ranking of interests is demonstrated for instance even in the fact that the basic rights have been anchored in the international human rights conventions and constitutional law and practically all states stipulate fundamental rights for people. Furthermore, criminal law shows very clearly that goods enjoy different levels of protection and, not least, private law also often differentiates when assigning defences. This is increasingly acknowledged – sometimes openly and sometimes tacitly – in France too and this recognition is already to be found in reform proposals there[168]. The common opinion among almost all legal systems that the protection of interests of different ranks must be different and thus also the duties of care can be more intensive or less strict will thus encounter hardly any serious resistance.

8/112 It is more difficult to find consensus on whether or not the *»all-or-nothing principle«* should apply. There would seem at first to be an unbridgeable gap between French and Norwegian law; nonetheless, ultimately this appears not quite true. For instance, the principle of apportionment of damage when the victim has joint responsibility applies nowadays presumably in all legal systems[169]. Furthermore, there is also a reduction clause in Norway even though the all-or-nothing principle is otherwise maintained. Finally, it must be pointed out that the boundaries of imputation, as drawn by adequacy and the protective purpose of the rule, which are widely recognised, can lead in sum to adjusted compensation for damage. On the other hand, in Austria the gradation of compensation according to the degree of fault is rejected nowadays de lege ferenda and is no longer to be found in the reform drafts. Thus, one could say that full compensation when the prerequisites for liability are fulfilled is recognised in general but only within the boundaries drawn by adequacy and protective purpose of the rule, consideration of the victim's contributory responsibility and often subject to a reduction clause; insofar there remains little doubt that there are very substantial deviations from the all-or-nothing principle.

8/113 The correct question is therefore not simply whether the all-or-nothing principle should be recognised or not, but to what extent it should apply and when departures from it are appropriate. The answer depends on the countervailing main concerns of the legal systems and their optimal implementation: on the one hand, there is the aspect of *legal certainty,* on the other hand justice in the specific case at hand. Legal certainty certainly suffers if the extent of the compensa-

167 PETL provide in art 2:102 for a ranking of the protected interests based on comparative law findings; cf the explanations on this rule in *European Group on Tort Law* (ed), Principles of European Tort Law: Text and Commentary (2005) 30 ff.

168 On this *Quézel-Ambrunaz,* JETL 2012, 24 ff.

169 Basic Questions I, no 6/204; further *Yamamoto,* Japan no 7/807 ff.

tion recoverable is not foreseeable because it depends on too many, insufficiently clear prerequisites, the affirmation or rejection of which is then necessarily largely at the discretion of the judge. *Justice in the particular case at hand,* in turn, suffers when boundaries are drawn too rigidly, meaning that minor differences determine whether there is full compensation of damage or no compensation at all. It must be stressed in this context that legal certainty is also impaired here, as it is then hardly foreseeable whether the court will see the material circumstance as lying a little on this side or on the other of the respective boundary. This uncertainty is very generally increased by the rule on proof applicable in common law[170], which is based on the balance of probabilities and thus makes the decision dependent on whether the inexactly ascertainable probability is found to be 49 % or 51 %; however, this already relates to a general problem of burden of proof and not a specific substantive law of damages problem.

8/114 It is controversial whether besides the above-mentioned widely recognised deviations from the all-or-nothing principle, namely in the case of contributory fault, the boundaries set by adequacy and purpose of the rule and the reduction clause that applies by way of exception, other departures also ought to be accepted. The hard core of the debate on the all-or-nothing principle would seem to lie mainly in the area of uncertain causation. Neither a compromise nor the successful persuasion of the respective »opposing sides« seems within sight at present; this will be discussed in more detail below (see no 8/214 ff). The fact that partial compensation solutions are almost exclusively advocated for the field of potential causation and not in the case of wrongfulness or fault is presumably due to the possible fact that the perpetrators in causation cases in any case carried out some act that was dangerous to a highly concrete degree in a manner imputable to them, namely breaching duties of care and culpably, and thus are accountable for the lack of clarity as regards causation. However, when it comes to determining breach of duty of care or fault, it is not even clear whether the person in question is blameable in any way, therefore neither can they be deemed accountable for the lack of clarity, for which they might otherwise be blamed.

8/115 As to the question of whether *rigid,* firm or *elastic rules* are preferable, there is considerable disagreement, for example between France, Norway, Poland and Austria on the one hand, and Germany on the other. However, a first step in the sense of agreement on a middle course does seem achievable. By this, I do not mean the flexible system[171] I favour; in this respect the perceived difficulty of its implementation gives rise as yet to too many concerns and much persuasion work remains to be done.

170 On this *R.W. Wright,* Proving Facts: Belief versus Probability, in: Koziol/B.C. Steininger (eds), European Tort Law 2008 (2009) 79 ff.

171 Above no 8/60 ff as well as Basic Questions I, no 1/28 ff.

8/116 As already explained above in the preliminary remarks (no 8/46 ff), *rigid* rules almost inevitably – as shown by the German example – make it impossible to adapt to changing circumstances and the courts take flight to the general clauses and end up trying to circumvent the hard and fast rules, which is not exactly favourable to the intended legal certainty but instead makes decisions unpredictable and inexplicable. On the other hand, *general rules,* as we know them in French and Austrian law, mean that insufficient guidelines can be given to the courts as the rules are too hazy. A middle course between these two extremes would at least be capable of consensus, with more elastic rules being formulated but then also reinforced by the definition of factors material for specification. This would mean there was as far as possible consideration of the main countervailing concerns, namely the need for legal certainty – this being addressed by clarity and specificity, as well as sufficient elasticity in order to decide individual cases appropriately. At least this middle course would be necessary for rules that are intended to serve harmonisation or unification purposes as otherwise in the case of open, undefined rules it must be feared that they would be applied too differently in various countries due to the diverse national legal cultures.

8/117 Nonetheless, the following difficulty, which no doubt is often the reason that rigid instead of elastic rules are promulgated, must also be mentioned: the formulation of elastic, more general provisions means that the rule-maker must previously have reached clarity on which fundamental notions and which value judgements are material in respect of the rule's scope; only then can the factors that should be taken into account be stipulated, factors that can provide guidance on the concretisation of the rule. The Continental legislators shy away from this work, keeping their focus mostly on the governing of some particular, current problem and not a consistent, overall system. In the common law, this issue is aggravated by the fact that the courts' task is in fact to decide specific cases brought before them and not to develop a system of general rules – albeit they ought to take these fundamental concepts into account when making their decision.

Part 2 The law of damages within the system for the protection of rights and legal interests

I. The term »law of damages«

In the German version of »Basic Questions of Tort Law from a Germanic Perspective« (»Grundfragen des Schadenersatzrechtes«), the title of the second chapter refers to *»Schadenersatzrecht«* within the framework for protecting legal goods (»im Gefüge des Rechtsgüterschutzes«). Despite all uncertainties regarding the meaning of the term »Schadenersatzrecht«[172], it is nonetheless clear that it refers to those rules that set out under which conditions and to what extent a victim may seek compensation for damage suffered. It may, however, be questionable whether it addresses extra-contractual compensation exclusively or also includes contractual compensation. **8/118**

In the English version, »Basic Questions of Tort Law from a Germanic Perspective«, chapter 2 is entitled »The law of damages within the system for the protection of rights and legal interests«; thus, in contrast to the title of the book, the reference is not to »tort law«. This is an attempt to take account of the translation difficulties mentioned in the »Preface« to the book and to make it as clear as possible that the rules at issue are those that are referred to in German as »Schadenersatzrecht« and thus relate to the *compensation of damage caused.* The expression »tort law« was avoided as the area that it covers is substantially broader and thus precisely this expression is not useful when trying to clearly define the topics at issue – which are rooted in the compensation of damage: the law of torts under common law includes not only the »true torts«, which lay out »damages« as the legal consequence[173], but also torts that do not require the existence of damage and thus are not directed at compensating such, or which lead to claims for surrender of property, injunctions or disgorgement of profit. Besides this, as regards »damages«, it is only »compensatory damages« – which admittedly are the core type[174] – that aim at compensating damage; this is not the case with respect to gain-based[175], restitutionary, exemplary or punitive, nominal or contemptuous **8/119**

172 On this in more detail *Koziol, Schadenersatzrecht* and the Law of Torts: Different terms and different ways of thinking, JETL 2014, 257 ff.

173 *Heuston/Buckley,* Salmond and Heuston on the Law of Torts[21] (1996) 8.

174 See *Green/Cardi,* USA no 6/23.

175 On these see *Weinrib,* Corrective Justice (2012) 117 ff.

damages[176]. Therefore, only the law of those torts that provide for compensatory damages corresponds to the law of damages in the German speaking countries and in other Continental European legal systems.

8/120 This chapter deals with the position of the liability laws directed at the compensation of damage caused within the overall system for rules protecting legal rights and interests also directed at other legal consequences, for example relating to preventive injunctions, reparative injunctions, claims for the surrender of unjust enrichment, for disgorgement of profit, social security law and claims against compensation funds[177], in particular in respect of mass catastrophes[178] and terrorist attacks[179]. This is important because the aim is to reveal the relationship between legal consequences and the prerequisites for claims.

II. Comparative review

8/121 On the one hand, in the common law area the *isolation* of the law of torts already mentioned above (no 8/29) and the specialisation of academics in this legal field manifestly lead to a neglect of surrounding protection mechanisms and thus also of the functional interplay of the different legal fields with their different legal tools. On the other hand, the collection of very different torts with diverging prerequisites and extremely different legal consequences together under one heading certainly does not help with elaborating the common elements of the roughly 70 different torts[180].

8/122 However, concentrating on the law of damages for whatever other reasons can also lead to a *loss of the big picture* regarding the protection of legal rights and interests; perhaps this is one of the reasons why the law of damages panel (Fachsenat) of the German Federal Court of Justice (Bundesgerichtshof) overlooked the

176 See on this *Oliphant,* England and the Commonwealth no 5/45 ff; *Green/Cardi,* USA no 6/23; *Magnus,* Comparative Report on the Law of Damages, in: Magnus (ed), Unification of Tort Law: Damages (2001) 185; *W.V.H. Rogers,* Winfield and Jolowicz on Tort[18] (2010) no 1.2; cf further *Koziol,* JETL 2014, 266 f.

177 On this, in detail and elaborating systematic insights *Knetsch,* Haftungsrecht und Entschädigungsfonds (2012); this paper deals with German and French law.

178 See on this *Faure,* Financial Compensation in Case of Catastrophes: A European Law and Economics Perspective, in: Koziol/B.C. Steininger (eds), European Tort Law 2004 (2005) 2, as well as reports in: *Faure/Hartlief* (eds), Financial Compensation for Victims of Catastrophes: A Comparative Legal Approach (2006).

179 On this, for example, *B.A. Koch/Strahwald,* Compensation Schemes for Victims of Terrorism, in: B.A. Koch (ed), Terrorism, Tort Law and Insurance. A Comparative Survey (2004) 260 ff.

180 *Oliphant,* General Overview, England and Wales, in: Winiger/Koziol/B.A. Koch/Zimmermann (eds), Digest of European Tort Law II: Essential Cases on Damage (2011) 1/12 no 1; cf further *Koziol,* JETL 2014, 273 f.

law on unjust enrichment based on interference in the Princess Caroline case and instead misused the law of damages, and in doing so disregarded its true function, for the disgorgement of a benefit gained. The country reports – except for France[181] – also suggest that beyond the common law area, the *interplay* of the different legal tools available under the legal systems, which according to their different functions have different prerequisites and diverse legal consequences, is very generally neglected. This clearly leads not only to neglect of the differences between the claims and how they should interplay appropriately but also to unfair results, since cases that should be evaluated differently are treated alike and those that are alike are treated differently, so that in the end ill-founded decisions are the outcome.

A fundamental concern that is practically taken for granted from a justice perspective[182], namely the *balancing of the claims' prerequisites with their legal consequences* so that the graver the legal consequences the more weighty the prerequisites must be, is given surprisingly little consideration in *English law* in respect of the entire system of protection for legal rights and interests, although in the context of the law of damages itself it is emphasised as a basic principle that »liability imposed should be proportionate to the gravity of his conduct«[183]. Hence, *Oliphant*[184] rightly anticipates that Continental Europeans will be astonished to see that under English law it is the law of torts that presents the most important tool to regain lost possession of things. The common law missed out on developing a legal tool corresponding to rei vindicatio; only via the factual elements of the tort of »conversion« is a claim for recovery created for the owner when his ownership rights have been infringed[185]. As the Continental claim to have property restituted to the owner (Eigentumsklage) does not set out any greater prerequisites other than that the claimant must be the owner and that the defendant should have no objective right to possession, there appears to be a very substantial difference in this respect to the English claim based on conversion, as such comes under the law of torts. The difference is not quite so great as first appears, however, as the delict of »conversion« does not require any fault but only wrongfulness in the sense of the behaviour of the defendant infringing the ownership right of the claimant. Nevertheless, this in turn leads, on the other hand, to a glaring contrast with Continental law as, in the absence of fault, the defendant is made liable, on the one hand, like an insurer for the loss of a thing[186] and, on the other hand, also for the consequential damage resulting from infringing ownership rights. Thus, dealing **8/123**

181 *Moréteau,* France nos 1/3 ff and 21 ff.
182 Basic Questions I, no 2/95.
183 *Oliphant,* England and the Commonwealth no 5/63.
184 *Oliphant,* England and the Commonwealth no 5/34 ff.
185 See on this in more detail *Rogers,* Winfield and Jolowicz on Tort[18] no 17.6 ff.
186 *Rogers,* Winfield and Jolowicz on Tort[18] no 17.8.

with the claims to recover under the »law of torts« – inappropriately to Continental European eyes – means that not only do the prerequisites for the simple recovery claim appear to have been set far too high, but also that those for liability for consequential damage and loss of the thing in question appear far too low.

8/124 By comparison, when it comes to preventive and reparative injunctions, which in common law are also handled under the »law of torts«[187], it is taken into account in manifold ways that these usually constitute less onerous legal consequences than does meeting claims for compensation of damage sustained: the prevailing opinion is that no fault is required for an injunction to be granted[188]. The relationship with claims for unjust enrichment based on interference, which also represent a less onerous legal tool and the interplay with this seems, on the other hand, not to have been considered adequately in England[189].

8/125 Far less onerous legal consequences are stipulated by English law subject to the usually nonetheless weighty prerequisites of the law of torts in the form of nominal damages[190]: these are merely intended as recognition of the fact that the claimant's rights were infringed although no pecuniary damage was caused. Thus, they could be counted as a type of natural restitution in cases in which only non-pecuniary harm is sustained[191]. On the other hand, the law of torts also provides for punitive damages and other legal consequences that actually go beyond compensating damage and partially have a penal nature[192], so that the boundary with criminal law seems to have been crossed. It is noteworthy, firstly, that this involves the imposition of punishment and thus very grave legal consequences[193], without in particular the requirements set out by criminal law and criminal procedural law having to be met, for example as regards the principle of nulla poena sine lege or the burden of proof; it even suggests that the camouflaging of such as a law of damages claim may indeed be aimed at circumventing the stricter criminal law standards. Moreover, incorporating it into private law means that the penalty paid does not fall to the state but to the claimant, meaning in turn that such gains a windfall not justifiable under private law since he receives considerably more than the compensation of his loss.

8/126 In order to understand the overall system in common law, in particular in respect of the transfer of penal functions to private law, it may be important to con-

187 On this *Oliphant,* England and the Commonwealth no 5/39 ff.
188 See *Lunney/Oliphant,* Tort Law. Text and Materials[5] (2013) 637.
189 On this *Oliphant,* England and the Commonwealth no 5/39 ff.
190 *Oliphant,* England and the Commonwealth no 5/50.
191 On this *Koziol,* Concluding Remarks on Compensatory and Non-Compensatory Remedies, in: Fenyves/Karner/Koziol/Steiner (eds), Tort Law in the Jurisprudence of the European Court of Human Rights (2011) no 22/19 ff.
192 *Oliphant,* England and the Commonwealth no 5/45 ff.
193 Cf on this *Oliphant,* England and the Commonwealth no 5/52.

sider that criminal law has a relatively reduced scope[194] and above all that it does not cover slightly or indeed grossly negligent actions; moreover, administrative penal law is by no means as important as in Continental Europe.

8/127 As far as social benefits in England and the Commonwealth countries are concerned, *Oliphant*[195] points to the interplay between the law of torts and the workers' compensation systems, which in particular in Great Britain have developed into a general social welfare system. Since 1989 there is no longer double satisfaction; this has been accomplished more by deducting social benefits from compensation than by independent recourse against the injuring party.

8/128 In respect of the *USA, Green/Cardi*[196] express doubts that criminal law can exert sufficient deterrent effect, in particular insofar as mass damage caused by companies is concerned. Accordingly, *Green/Cardi*[197] – like *G. Wagner*[198] – advocate a modification of punitive damages, which they dub »incentive-enhancing damages«, at least for areas in which compensation claims serving to remedy damage also fail. The fact that the famous Caroline case is quoted also shows, however, that *Green/Cardi* like the German Federal Court of Justice (Bundesgerichtshof) do not always take into consideration the appropriate functions in the interplay between the law of damages and that of unjust enrichment. Nevertheless, they do stress that the claim for »restitution«, which is directed as disgorgement of unjust enrichment, unlike the law of torts, does not require any wrongdoing[199]; thus, regard is had to the balance between legal consequences and prerequisites. In contrast, the more system-appropriate variation of punitive damages addressed in Basic Questions I[200], where anything exceeding the costs undertaken by the claimant is paid to the state or to social institutions and where criminal law principles receive adequate consideration in the proceeding, is not considered. Insofar the justified references made by *Green/Cardi* to gaps in protection still cannot carry the argument that such penalty payments may be awarded to the claimant in compensation claim proceedings[201].

8/129 *Norwegian law* is clearly somewhere between common law and legal systems with comprehensive codification, as it provides only for partial rules. It is remarkable that the courts nonetheless see their tasks very differently to their common

194 *Oliphant,* England and the Commonwealth no 5/52.
195 *Oliphant,* England and the Commonwealth no 5/13 ff.
196 *Green/Cardi,* USA no 6/27.
197 *Green/Cardi,* USA no 6/36.
198 *G. Wagner,* Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe? AcP 206 (2006) 451 ff; *idem,* Präventivschadensersatz im Kontinental-Europäischen Privatrecht, Koziol-FS (2010) 951 ff.
199 *Green/Cardi,* USA no 6/50.
200 Basic Questions I, no 2/62.
201 This difficulty is also pointed out briefly by *Green/Cardi,* USA no 6/27 ff.

law counterparts: as *Askeland*[202] emphasises, the courts are »apt to construct and develop general private law principles«. This is clearly juxtaposed to the strong case-by-case emphasis highlighted by *Green/Cardi.* The Norwegian courts thus strive – as *Askeland* stresses – towards the development of a consistent overall system; in so doing they promote fairness by having regard to the principle of equal treatment and at the same time also foreseeability and transparency of decisions. *Askeland*[203] therefore rightly says: »The Norwegian approach may in the terms of *van Dam* probably be placed somewhere in between the German ›pyramidic‹ law and the English case-oriented and pragmatic law.«

8/130 Accordingly, *Askeland*[204] can also report that in Norway efforts are discernible towards distinguishing the individual legal areas and instruments from each other, to use them according to their functions and to grade the prerequisites of the claim according to the gravity of the legal consequence[205]. For instance, outside the law of damages the legal instruments of rei vindicatio, preventive injunctions and the actio Pauliana are recognised. Furthermore, a distinction is drawn between covering the damage via the means available under the law of damages and disgorgement of unjust enrichment, albeit the law on unjust enrichment is not yet clearly and comprehensively developed. It is remarkable that Norwegian law has developed the following principle taking account of the notion of deterrence[206], which *Wilburg*[207] above all has proposed for the further development of the law on unjust enrichment in Austrian and German law: Whoever deliberately uses a third party's goods without being entitled to do so for his own advantage shall pay an appropriate fee for this. The Austrian Civil Code (ABGB) also has further regard to the notion of deterrence in that it provides for the highest price available on the market in this respect (§ 417 ABGB).

8/131 Norwegian law[208] also takes into account the primary compensation aim of the law of damages, increasingly also in the field of non-pecuniary damage, and in contrast, the primary deterrence aim of criminal law, while the fundamental difference between the tasks of public and private law also plays a role; accordingly the Supreme Court has never yet awarded punitive damages.

8/132 As already mentioned above (no 8/74), a decisive role is played in Norway by the notion of solidarity when it comes to personal injury. This leads in turn to generous social benefits and a relegation of the law of damages to the background in this context.

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202 *Askeland,* Norway no 2/15.
203 *Askeland,* Norway no 2/15.
204 *Askeland,* Norway no 2/20.
205 Thus, preventive injunctions only require that the claimant has a protected right and this is threatened; *Askeland,* Norway no 2/24.
206 *Askeland,* Noway no 2/19.
207 See Basic Questions I, no 2/31.
208 *Askeland,* Norway no 2/32.

In his contribution on *French* law, *Moréteau*[209] recognises the need to clarify the different aims of public and private law as well as their respective specific tasks and prerequisites. The special emphasis on the goal of securing compensation for the injured party[210] explains why deterrence is left to other legal fields[211]. This also means that any reduction of the deterrent effect as a result of third-party liability insurance is not bemoaned, instead above all the advantages for the injured party are emphasised. A logical consequence of this emphasis on the compensatory function is ultimately the rejection of punitive damages, whereby it must be pointed out in particular that there is far less need for such an instrument in the European legal systems than in the USA, which has more gaps in the system for deterrence of damage[212]. The French approach of using state compensation measures to ensure that almost everyone is insured against catastrophes has a lot to be said for it[213]; it neatly avoids the often seemingly arbitrary decision on state compensation in each individual case of catastrophe, and the victims receive compensation even when they are the only victim and therefore no catastrophe exists[214], and moreover it means that the victims jointly bear the costs of the insurance. **8/133**

Moréteau also shows that the principle of proportionality between legal consequences and prerequisites is taken account of in many ways, not only in the law of damages itself[215], for instance, but also in the interplay between reparative injunctions, the law on unjust enrichment and compensation claims[216], or in the case of minor infringements of personality rights that are remedied by »nominal damages« or the publication of a correction[217]. But *Moréteau* then opines that the principle of proportionality »may make sense in a world where most human and social interaction would be governed by traditional ›Civil Code‹ mechanisms. However, in a complex society combining and recombining elements of private and public law, promoting social solidarity as a key element of the public good, pragmatic approaches tend to prevail over dogmatic views«[218]. In this respect it must, however, **8/134**

209 *Moréteau,* France no 1/20 ff.
210 *Moréteau,* France nos 1/1 ff and 20.
211 *Moréteau,* France nos 1/7 and 51.
212 *Moréteau,* France no 1/46 ff.
213 *Moréteau,* France no 1/56 ff; see also *Moréteau,* Policing the Compensation of Victims of Catastrophes: Combining Solidarity and Self-Responsibility, in: van Boom/Faure (eds), Shifts in Compensation Between Private and Public Systems (2007) 210 ff.
214 The problem of the distinction between catastrophes and damage to individual people as well as small circles of people when it comes to aid for catastrophes is pointed out, for instance, by *Faure/Hartlief,* Introduction, in: Faure/Hartlief (eds), Financial Compensation for Victims of Catastrophes. A Comparative Legal Approach (2006) 1, and *Moréteau* in: van Boom/Faure (eds), Shifts in Compensation Between Private and Public Systems 200 ff.
215 *Moréteau,* France no 1/197 ff.
216 *Moréteau,* France no 1/29 ff.
217 See *Moréteau,* France no 1/169.
218 *Moréteau,* France no 1/62.

be pointed out that precisely this is the task of legal science: to work towards a correct weighting of the consequences of violations of a right and how it is handled according to underlying values and thus to help the fundamental standard of fairness to prevail. Furthermore, the existence often emphasised in common law[219] of an opposite of pragmatic and dogmatic solutions must be rejected: on the one hand, it is rightly stressed that there is nothing more practical than a good theory, and on the other hand, it remains a completely open question what criteria should be used to determine the quality of practice, if reference is not to be had to dogmatic aspects.

8/135 Directly after his rather sceptical statement, *Moréteau* also makes a very important remark, revealing where the decisive focus should lie in his opinion: proportionality may not be examined with blinkers solely in respect of the prerequisites under the law of damages and the legal consequences but also in the overall context of the legal system. Specifically, he states: »Yet at the end of the day, it seems that under French law, strict liability is often coupled with insurance, making the tortfeasor easily liable but mitigating consequences by compulsory insurance coverage, whereas fault-based liability keeps developing in areas of higher risks that may not be insured or insurable. It may then be said that prerequisites fit the legal consequences, though more investigation may be needed to check whether this is always the case.« Thus, *Moréteau* does good service in pointing out that, when examining proportionality, insurability and compulsory insurance, inter alia, play a role since these aspects are very decisive in determining the burden ultimately falling upon the injuring party in the form of a duty to compensate.

8/136 In line with the different tasks ascribed to them, in *Hungary*[220] the law distinguishes between public law and private law legal tools. In private law, in rem actions to have property surrendered to its owner are available, completely independent of the law of damages and requiring no fault; in the case of other infringements, the law provides for a whole array of different instruments ranging from a declaration that there has been an infringement of a right to full compensation of the damage. Regard is had to the proportionality between legal consequence and prerequisites: hence, preventive injunctions and reparative injunctions do not require any fault; in the case of self-defence, the interests under threat are weighed up against those injured by the act of self-defence. *Menyhárd* rightly criticises the courts' view that claims for unjust enrichment are subsidiary in relation to compensation claims, because this fails to appreciate the different functions. In accordance with the different weight of the legal consequences, claims for unjust enrichment appropriately do not require any fault but only a wrongful interference

219 See *McGrath/Koziol,* Is Style of Reasoning a Fundamental Difference between the Common Law and the Civil Law? RabelsZ 78 (2014) 727 ff.

220 *Menyhárd,* Hungary no 4/5.

with third-party goods. In respect of the law of damages, *Menyhárd* also points out that in essence restoration to the previous state is striven towards and monetary damages are secondary[221]; in the case of non-pecuniary damage the difference to compensation of pecuniary damage by monetary payments is emphasised. Punitive damages are rejected, inter alia, with the comment that penal sanctions do not belong in private law and deterrence is primarily the task of criminal law. Social benefits supplement the law of damages and do not push this aside, as the injuring party is subject to recourse claims[222]. The hitherto recognised disgorgement of profit in favour of the state is no longer provided for in the new Code; this is astonishing because in other legal systems this legal tool enjoys increasing popularity. However, this change only applies to the disgorgement of profit in favour of the state in civil proceedings, as this cannot be reconciled with the principles of civil proceedings. The report does not indicate whether disgorgement of profit continues to be available in public law and in particular in criminal proceedings.

Ludwichowska-Redo[223] begins chapter 2 of her report on *Polish* law with the fun- **8/137**
damental statement: »A claim for damages offers far-reaching protection of rights and interests, but is also subject to strict requirements. A mere interference with protected interests is not enough to justify such a claim; further conditions must be fulfilled, such as unlawfulness and fault, or risk posed by a particular activity. The law of damages is, however, only one of the remedies provided by the legal system to serve the protection of rights and interests.« *Polish* law clearly has regard to the proportionality between the gravity of the legal consequence and the weight of the prerequisites. Accordingly, in line with Continental European tradition, it includes rei vindicatio, which simply requires that the claimant has a right to the thing and the defendant does not; more extensive claims, such as fees for use or compensation, require additional prerequisites that – like in Germany – are set out in special provisions of the law of damages and on unjust enrichment[224]. Preventive injunctions also do not require fault under Polish law but simply an unauthorised interference with a protected right[225]. Likewise, reparative injunctions and claims based on unjust enrichment set out less weighty prerequisites than claims for compensation[226]. *Ludwichowska-Redo*[227] refers to the claim for disgorgement of profit in the case of unlawful interference with a third party's intellectual property; she also advocates an expansion of the scope of this beyond the law on intellectual property. The Polish view is that the law of damages primarily has a

221 *Menyhárd,* Hungary no 4/24.
222 *Menyhárd,* Hungary no 4/44 f.
223 *Ludwichowska-Redo,* Poland no 3/13.
224 *Ludwichowska-Redo,* Poland no 3/14 f.
225 *Ludwichowska-Redo,* Poland no 3/17 f.
226 *Ludwichowska-Redo,* Poland nos 3/20 ff, 24 ff.
227 *Ludwichowska-Redo,* Poland no 3/28 ff.

compensatory function, but the function of deterrence is also recognised[228]; punitive damages are rejected, however[229]. The fact that under Polish law social benefits reduce the victim's claims for compensation but the social security body nonetheless has no recourse against the injuring party has already been mentioned above (no 8/75). Victims of crime may receive compensation from the state if they are unable to enforce their compensation claim against the criminal; to this extent their claims are transferred to the state[230]. Victims of catastrophes receive compensation, if at all, on the basis of ad hoc rules[231]. There is provision for disgorgement of profit in favour of the state[232]. It is remarkable that Polish criminal law also has a recognised compensatory function since a duty to compensate is imposed on criminals[233].

8/138 In the *Japanese* report[234], weight is certainly accorded to the overall system of protection of legal goods in that the legal protection afforded by granting claims against the perpetrator and by punishment of the perpetrator are brought into context and their deterrent effect is emphasised. When it comes to granting claims, a further distinction is made between the protection against damage due to lawful actions (dispossession, damage by infringements or risks permitted under administrative law[235]), on the one hand, and damage due to unlawful actions (actions for preventive and reparative injunctions, unjust enrichment and compensation claims), on the other hand, and the social security law protection mechanisms are described[236]. Gradation of the prerequisites in accordance with the gravity of the legal consequence is apparently not discussed in detail.

III. Conclusions

8/139 To start with it must be noted that the Continental version of the *law of damages,* which is directed at the compensation of damage suffered, corresponds in common law only in respect of that part of the law of torts that provides for compensatory damages as a remedy. The question regarding the position of the law of dam-

228 *Ludwichowska-Redo,* Poland no 3/33.
229 *Ludwichowska-Redo,* Poland no 3/34.
230 *Ludwichowska-Redo,* Poland no 3/38 f.
231 *Ludwichowska-Redo,* Poland no 3/40.
232 *Ludwichowska-Redo,* Poland no 3/41 f.
233 *Ludwichowska-Redo,* Poland no 3/43 ff.
234 *Yamamoto,* Japan no 7/4 ff.
235 Cf on this also the Japanese discussion, *Yamamoto,* Japan no 7/6 ff.
236 On this see also *Yamamoto/Yoshimasa,* Employers' Liability and Workers' Compensation: Japan, in: Oliphant/G. Wagner (eds), Employers' Liability and Workers' Compensation (2012) 333 ff.

ages governing the *compensation* of harm suffered within the overall framework of the legal system is thus different in civil and common law systems: in civil law this is about balancing the law of damages with other areas of law; in common law the torts directed at compensatory damages must, however, first be balanced internally with the torts that provide for other remedies and only then put into relation with legal fields outside the law of torts. The tasks of elaborating the different functions of the legal instruments and how to balance them are, however, equally material. Nonetheless, care must be taken not to jump to conclusions from the far-ranging law of torts to the significantly narrower field of the law of damages aimed at compensating damage; it is only those areas that provide for compensatory damages that are comparable with the law of damages in civil law systems.

8/140 In the United Kingdom and in the USA there are few efforts discernible towards achieving a *consistent overall system;* this derives above all from the fact that the courts which are responsible for the further development of law only decide the respective individual case, but do not have regard to more general questions. This also means that any fine-tuning between the legal tools, consideration of the principle of proportionality between legal consequences and prerequisites and an appropriate interplay between the legal tools based on their consequences is hardly attempted at all. This is in clear contrast with Norway, where the development of the law also largely takes place via the courts, but above all it is in contrast to other Continental European legal systems. In relation to such, it must also be noted that even in codified legal systems precisely the law of damages is an area in which, due to the diversity of the problems at issue, technical and social developments and the inadequate legal framework, judge-made law plays a substantial role in all legal systems, but nonetheless the overall system is given far more attention.

8/141 However, there are also further difficult issues that are material when it comes to the boundaries between and the interplay of different legal instruments and these must be clarified. Thus, it must be understood that the distinction between *public law and private law* is not a purely terminological difference but one based on the different tasks to be performed in both areas of law and different underlying values at issue[237]: insofar as the protection of the individual's interests are concerned, different underlying values for the relationship between the individual and the state as opposed to other persons of equivalent standing play a substantial role; thus, the fundamental rights and civil liberties of all individuals should secure the free development of the personality insofar as the state is concerned. As regards relationships with other persons, personality rights of equal rank are at issue, and the scope and protection of all these rights ought to be balanced in the

237 See on this, for example, *F. Bydlinski,* Kriterien und Sinn der Unterscheidung von Privatrecht und öffentlichem Recht, AcP 194 (1994) 319.

best manner possible. The fact that persons of basically equal rank are involved in private law also plays a decisive role in the applicability of the principle of mutual justification[238]; but thus also as regards the issue of whether private law is an appropriate venue for awarding punitive damages that give the claimant a benefit that cannot be justified within the framework of private law.

8/142 There is also a great need for debate in respect of the implementation of the principle of *proportionality between legal consequence and prerequisites* and there is certainly much persuasive work still to be done. Still, the above glance at the country reports has shown that the principle of proportionality is indeed taken into consideration when it comes to *preventive and reparative injunctions,* in that, due to the less onerous nature of the legal consequences – unlike under the law of damages – no fault is required. EU directives also have regard to this notion[239]. Astonishingly, however, the required distinction is neglected in the Draft Common Frame of Reference (DCFR), in that art VI.–1:102 DCFR expressly makes enforcing defence rights dependent on meeting the same criteria for imputation as for compensation claims.

8/143 While it is increasingly accepted that claims for surrender of *unjust enrichment* must be distinguished from compensation claims due to the different legal consequences[240], nonetheless the elaboration of the prerequisites for such claim to surrender still seems to present considerable difficulties in some legal systems[241]. In other countries, however, the different prerequisites for the claims are clearly highlighted, for instance in France[242], Poland[243] and Hungary[244], when it is emphasised that the aims and prerequisites are different and that claims based on unjust enrichment do not require the presence of any fault or other grounds for imputation but only the gaining of an advantage from assets that belong to someone else. The same applies in respect of the common law. Thus, it is established in the USA[245] that it is sufficient that: »(1) the defendant received a benefit; (2) at the expense of the plaintiff; and (3) it would be unjust for the defendant to retain that benefit. The most notable distinction between restitution's constituent elements

238 Basic Questions I, no 2/59 with additional references. This principle is advocated in substance also by *Weinrib,* Corrective Justice (2012), in particular 2 ff, 15 ff, 35 f.

239 See, for example, the explicit rule in art 11 para 2 of Directive 2005/29/EC of 11.5.2005 concerning unfair business-to-consumer commercial practices in the internal market; art 5 para 3 Directive 2006/114/EC of 12.12.2006 concerning misleading and comparative advertising.

240 *Jansen,* The Concept of Non-Contractual Obligations: Rethinking the Divisions of Tort, Unjustified Enrichment and Contract Law, JETL 2010, 16 ff, rightly emphasises, on the other hand, that the common elements between legal obligations should not be lost from sight.

241 *Askeland,* Norway no 2/25 ff.

242 *Moréteau,* France no 1/36 ff.

243 *Ludwichowska-Redo,* Poland no 3/24 ff.

244 *Menyhárd,* Hungary nos 4/15 and 30.

245 *Green/Cardi,* USA no 6/50; cf also *Oliphant,* England and the Commonwealth no 5/43.

and those of most tort actions is that a plaintiff need not prove wrongdoing on the part of the defendant.« The fact that in contrast to the law of damages no wrongdoing is required, ie neither fault nor any breach of a duty of care, is in line with the recognition that a less onerous legal consequence is at stake: disgorging an inadmissibly attained benefit is less onerous for the person who must surrender it than it is for a liable party to use his own assets to remedy a third party's loss[246].

8/144 The country reports – completely in line with the aim of this investigation – do not provide a sufficient basis to sketch an overall system of all legal instruments available when it comes to threatening or already manifest interferences with protected interests. Particular groups of claims, such as those for disgorgement of profit (below no 8/172) or punitive damages (no 8/174) will, however, be addressed in the course of the discussion below.

8/145 At this point, it must be noted that the *transfer of ideas* is by no means intended as a one-way system from Continental European civil law systems to common law. It should never be overlooked that the codified overall systems of today are still far short of persuasive power as to date no really consistent, balanced overall system can by any means be offered. On the other hand, as already mentioned, it must also be accepted that in the codified legal systems too much focus is given to general rules while in individual cases insufficient regard may be given to the specific features. Therefore, it is still necessary to take into consideration the doubting, critical assessments given by the representatives of common law as regards the present-day overall systems and to have proof that a consistent system is not only necessary in order to work towards the aim of justice but also feasible. On the other hand, this also requires common law lawyers to be open about the deficits of their system[247]. If both sides are willing to learn and are sufficiently ready to make compromises, I believe this task is indeed feasible, to the benefit of both presently juxtaposed models. The ideal would appear to be a combination of general, elastic rules that refer to the material criteria for value judgements with sufficiently wide room for the courts to manoeuvre in implementing these general guidelines[248].

246 Basic Questions I, no 2/27.

247 To this topic confer the interesting reflections by *Picker,* Richterrecht und Rechtsdogmatik, in: Bumke (ed), Richterrecht zwischen Gesetzesrecht und Rechtsgestaltung (2012) 85 ff.

248 Cf Basic Questions I, no 1/28 ff.

Part 3 The tasks of tort law

I. Compensatory function and deterrence function

A. Comparative law review

1. The Continental European legal systems and Japan

8/146 It is an acknowledged fact that the Continental European law of damages primarily has a *compensatory function* – this is the case with respect to the German legal family, France[249], Norway[250], Poland[251], Hungary[252] and also other countries[253]; the same is true of Japan[254]. This is frequently apparent from the statutory regulation, which is founded on the compensation of damage caused in a manner that is imputable to the liable party. Besides this, *Weinrib*[255] points out that restricting the legal consequence to compensation of the damage inflicted upon the victim corresponds with the principle of commutative justice. When it comes to compensating non-pecuniary damage, however, the notion of satisfaction[256] plays a role in some legal systems, for example sometimes still in Germany[257].

249 *Moréteau,* France no 1/64.
250 *Askeland,* Norway nos 2/1 ff and 33.
251 *Ludwichowska-Redo,* Poland nos 3/33, 48.
252 *Menyhárd,* Hungary no 4/51.
253 See on this with detailed references *Koziol,* Prevention under Tort Law from a Traditional Point of View, in: Tichý/Hrádek (eds), Prevention in Law (2013) 133.
254 *Yamamoto,* Japan nos 7/69, 362.
255 *Weinrib,* Corrective Justice (2012) 91 f.
256 In Norway the divergence from the notion of compensation is highlighted, *Askeland,* Norway no 2/51 f; see the notion of satisfaction in *Menyhárd,* Hungary no 4/55; cf also *Yamamoto,* Japan no 7/270. In Poland *(Ludwichowska-Redo,* Poland no 3/48) in contrast the notion of compensation is predominantly held to be material with respect to non-pecuniary damage as well.
257 *Schubert,* Die Wiedergutmachung immaterieller Schäden im Privatrecht (2013) 150 ff, 180 ff, 218 ff, emphasises in her most recently published, comprehensive investigation the compensatory function of compensation for non-pecuniary damage and considers that the debate on the satisfaction function is obsolete.

By contrast, in Continental European countries the *notion of deterrence*[258], as an aim of the law of damages[259], is sometimes accorded no importance[260] and predominantly ascribed merely secondary significance in that the threat of having to compensate exerts a certain, general deterrent effect[261]; this is the prevailing opinion in Japan too[262]. The primary implementation of the deterrence notion is left to public law, above all criminal law; thus, compensation payments under the law of damages are limited to the full redress of the damage sustained[263]. The notion of continuation of a right (Rechtsfortsetzungsgedanke)[264], which can be interpreted as an expression of the notion of deterrence and which leads to a minimum compensation of the market value (objective value), is sometimes implicitly[265] and sometimes explicitly[266] recognised. **8/147**

2. Fundamental differences between common law and Continental European legal systems

Oliphant[267] cites compensation as the commonly acknowledged aim of the law of damages and adds: »but there is some slippage between two distinct conceptions: first, that tort law should be evaluated by its ability to compensate for *all* injuries; secondly, that tort law aims at compensation as part of a regime of corrective justice«. *Oliphant* then emphasises: »Nowadays, compensation is most often thought of in the latter terms, which evidently leaves open the crucial question of when, and for what harms, one person is fairly accountable in tort law to another.« In **8/148**

258 On the concept and types of deterrence see *Tichý,* On Prevention in Law: Special Focus on Tort Law, in: Tichý/Hrádek (eds), Prevention 9.

259 When it is emphasised in Basic Questions I, no 1/7 that »it is important not to lose sight of the *primary* aim of the legal system, ie *prevention of damage*«, this does not mean that the primary function of the law of damages is seen as being deterrence but that the *legal system* should primarily strive towards preventing damage and thus the need to apply the law of damages; the compensation of the harm that has already occurred is more or less a damage management solution when prevention has failed (see also above no 8/77). Insofar there has been a misunderstanding by *Green/Cardi,* USA no 6/17 when they try to deduce a primary function of deterrence for the law of damages from these statements, which would be in complete contradiction of the statements in Basic Questions I, no 3/1 ff.

260 *Askeland,* Norway no 2/32.

261 See *Moréteau,* France nos 1/7 and 68 ff and the references in *Koziol* in: Tichý/Hrádek (eds), Prevention 135.

262 *Yamamoto,* Japan nos 7/71 ff, 277 ff.

263 *Askeland,* Norway no 2/31; *Ludwichowska-Redo,* Poland no 3/49 ff; *Menyhárd,* Hungary no 4/52; *Yamamoto,* Japan nos 7/80 f, 280 ff.

264 On this see the references in Basic Questions I, no 3/8 ff and in *Koziol* in: Tichý/Hrádek (eds), Prevention 155 ff; further *Weinrib,* Corrective Justice 88 ff, 93 f.

265 *Ludwichowska-Redo,* Poland no 3/49; *Menyhárd,* Hungary no 4/52.

266 *Yamamoto,* Japan no 7/259 f.

267 *Oliphant,* England and the Commonwealth no 5/57.

comparison, *Green/Cardi*[268] clearly have the former meaning in mind when they write: »An American tort observer would surely acknowledge that deterrence is not the sole aim of tort law. But surely compensation is not the sole aim of tort law, otherwise an injured person would be able to recover compensation from any deep pocket that the victim could find.«

8/149 There is a misunderstanding on this latter point if this was intended to refer to the Continental European, codified legal systems; clearly I have not yet managed to clarify this well enough and my previous attempts were in vain[269]: if the *criticism* of the material nature of the notion of compensation is based on how damage is by no means always recoverable and that the principle of compensation can offer little help when it comes to answering the question of what conditions must be fulfilled before compensation must be rendered, the notion of compensation is being ascribed absolutely the wrong task, at least in respect of the Continental European legal systems. The notion of the compensation function is not aimed at providing insights into the grounds for imputation but simply at establishing what the compensation claim should fulfil *if and when* the grounds for imputation are given. In any case, the notion of compensation expresses the aim of the Continental European law of damages, which is homogenous in this respect, and thus can provide orientation for how such claim should be constituted (eg natural restitution or monetary damages), and at least provides a guideline for the *extent* of the compensation claim and thus precludes the possibility, eg, of disgorgement of profit in the framework of the law of damages or the imposition of penalty payments. *Under which conditions* this compensation should be required can only be determined taking into consideration commutative and distributive justice[270] and therefore having regard to a multitude of grounds for imputation.

8/150 It must also be noted, however, that the fundamental notion of commutative justice points to compensation, as is also emphasised by *Oliphant*[271] when he writes: »Tort law embodies the principle of corrective justice: one who wrongfully causes another harm should correct that injustice by the payment of compensation.«

8/151 In this context, the objection made by *Green/Cardi* certainly has a point as regards the *common law*[272]*:* while the Continental European law of damages is a homogenous area as regards the basic prerequisites and the legal consequences that cover all rules that govern the prerequisites and content of the claims directed at

268 *Green/Cardi,* USA no 6/44.

269 Basic Questions I, no 3/2, there in connection with corresponding statements by *Kötz* and *G. Wagner*.

270 On these terms, see also *Weinrib,* Corrective Justice.

271 *Oliphant,* England and the Commonwealth no 5/54.

272 On this in more detail *Koziol, Schadenersatzrecht* and the Law of Torts: Different terms and different ways of thinking, JETL 2014, 260 ff.

the compensation of damage, common law proceeds on the basis of a multitude of *»torts«* with different prerequisites, in which respect moreover it must always be asked which legal consequences would apply if the external elements of the tort are fulfilled. It must be borne in mind – as already mentioned in no 8/29 – that by no means do all torts require the occurrence of damage and neither are they based on any uniform concept of »damage«, but instead about 70 »conceptions of damage« come into play[273]. Moreover, while the usual legal consequence is »damages«, this is nonetheless not always the case, and finally – again in contrast to Continental European laws of damages – the different types of damages are by no means always aimed at compensating damage, so that the legal consequences may be extremely various. The »law of torts« is therefore an extremely inhomogeneous field of law[274].

8/152 If then in the case of torts actionable per se, there is no requirement that damage has occurred, this in itself shows that the law of torts is not always directed at compensating damage, hence a compensatory function cannot always be ascribed to the law of torts. It must be added that the law of torts also provides for preventive injunctions that apply before damage is sustained and hence cannot serve the aim of compensation of damage either, but only of prevention. The conclusion that the law of torts is by no means consistently based on the notion of compensation is supported by a glance at the different types of damages[275]. *Rogers*[276] emphasises that sometimes an obligation »to disgorge the profits« is imposed, something which is regulated under the law of unjust enrichment in other legal systems, and he further highlights that if exemplary damages (punitive damages) are awarded in addition to the »compensatory damages«, this departs entirely from the notion of compensation and puts a penal function in the foreground. Finally, he points out that in some cases, eg »trespass to land«, only »a method of obtaining a declaration of rights« is at issue, ie a simple finding of a legal infringement, and mentions that in this context there is reference to the »ombudsman function« of the law of torts. Thus, only compensatory damages are aimed at the redress of damage sustained.

8/153 Hence, it is only that part of the law of torts which provides for compensatory damages that corresponds to the Continental European law of damages; this is, nonetheless, the substantial part. In respect of this part then, it can indeed be said

273 *Oliphant* in: Winiger/Koziol/B.A. Koch/Zimmermann, Digest of European Tort Law II: Essential Cases on Damage (2011) 1/12 no 1 stresses »As there are, according to one estimate, some 70 or more torts recognised by the common law, it could be said that there are in fact 70 or more different conceptions of damage in English tort law.«

274 *Weir,* An Introduction to Tort Law[2] (2006). Preface ix, puts this as follows in this cogent fashion: »Tort is what is in the tort books, and the only thing holding it together is their binding«.

275 See *Oliphant,* England and the Commonwealth no 5/45 ff.

276 *W.V.H Rogers,* Winfield and Jolowicz on Tort[18] (2010) no 1.2.

that the primary aim here too is the compensation of damage. Besides this, however, the general deterrent effect is also highlighted, though apparently reference is frequently made not to deterrence but to »social control«[277].

8/154 Insofar as punitive or exemplary damages are awarded, on the other hand, this is primarily about deterrence; whereas in the case of other heads of damages other aims take precedence.

B. Conclusions

1. Limitation of the comparative law discussion to the law concerning compensating damage

8/155 Thus, it has been shown that the debates start from different premises. When the law of damages is discussed in *Continental European* legal systems, this refers to a group of rules according to which, when the basic prerequisite of causation of damage and more or less generally defined other grounds for imputation, in particular fault liability, vicarious liability and strict liability, have been met, a certain type of legal consequence, namely the compensation of damage is stipulated (see § 823 para 1 of the German Civil Code, BGB). Insofar, this is a homogenous legal field in relation to the basic prerequisites and the legal consequence: the law of damages includes all rules that govern the prerequisites and content of claims directed at the *compensation of damage.*

8/156 In the *common law,* on the other hand, the starting premise is a multitude of »torts« that set out different prerequisites thus giving rise to the question of which legal consequences – which do not always consist in compensation of damage – are provided for (see above no 8/29 and no 121 ff). This is compounded by a far-ranging isolation of the »law of torts« from other legal fields, which does not serve to improve the overview of interrelationships and differences in function, for example between public law, criminal law and the law of damages. The apparently inadequate fulfilment of the need for deterrence via the criminal law in common law countries; the deficits in the development of the law on unjust enrichment; the hesitance with respect to compensating non-pecuniary damage; the hindrance of full compensation even for successful claimants as a result of the idiosyncrasies of procedural law; and undoubtedly several other reasons mean, moreover, that the »law of torts« is reverted to as a stop-gap and thus a clear delineation of its tasks as well as proportionality between the legal consequences and the relevant prerequisites seem hardly possible.

277 *Oliphant,* England and the Commonwealth no 5/61.

2. Consequences in relation to »punitive damages«

8/157 The different starting points in civil law and common law systems make extra caution necessary when comparing Continental European laws on damages and the law of torts in the common law. Thus, the law of damages in civil law jurisdictions *can only be compared* and therefore be open to harmonisation with that – admittedly very substantial – part of the law of torts in common law that provides for compensatory damages as the legal consequence and, accordingly, follows the *principle of compensation.* Insofar, however, as remedies are primarily directed at deterrence, they cannot in principle fall into the same category as the law of damages in Continental European legal systems.

8/158 It must be highlighted here, however, that even in common law, *punitive damages* meet with rejection when basic principles are considered. Thus, *Weinrib*[278] emphasises that punitive damages contravene the tenet of corrective justice, though his arguments are largely in line with the argumentation invoking the necessity of mutual justification[279]. *Weinrib* points out that punitive damages are inconsistent with corrective justice for reasons both of structure and of content. As to structure, he underlines that corrective justice requires that the normative considerations applicable to the relationship between defendant and plaintiff reflect the parties' correlative standing as sufferer of and doer of the same injustice. Therefore, it excludes considerations that refer to one of the parties without encompassing the correlative situation of the other. »The standard justifications for punitive damages – deterrence and retribution – are one-sided considerations that focus not relationally on the parties as doer and sufferer of the same injustice, but unilaterally on the defendant ... as doer. The place of such considerations is not private law but criminal law, because criminal law is concerned not with whether the accused has injured someone's particular right, but with whether the accused has acted inconsistently with the existence of a regime of rights in general.« So far as content is concerned, *Weinrib* elaborates that »punitive damages are inconsistent with the role of rights in corrective justice. Punitive damages do not restore to plaintiffs what is rightfully theirs, but instead give them a windfall.« According to *Weinrib,* punitive damages based on deterrence and retribution thus violate the limitation thesis that the remedy should only restore the plaintiff's right and not give the plaintiff more than that right or its equivalent[280].

278 *Weinrib,* Corrective Justice 96 ff, see also 169 ff.
279 On this Basic Questions I, no 2/59.
280 Cf also *Yamamoto,* Japan no 7/804.

3. Consequences relating to the influence of private law on behaviour

8/159 In more recent times it is increasingly being advocated that private law be drawn on as the *means to enforce rules*[281], whereby above all the deterrent effect of the law of damages should be exploited. Firstly, the discussion focused on the influence exerted by private law on markets in respect of the legal fields of unfair competition and antitrust, for which there have been strong impulses from the European Union[282]. The basic idea is the mobilisation of citizens, in particular consumers, to enforce rules by granting them private law claims in the case of misconduct by companies. The idea is that the costs caused when a large number of people assert claims will act as a steering mechanism, particularly effective in the commercial context. The crux is that not only are the side-effects of the claims that already exist under general rules at work but also that beyond this a basis is created in the public interest for further claims that do not primarily, or at least do not only, serve the protection of the individual interests of those bringing claims.

8/160 This can in particular mean that *pure economic interests* of the victims of unfair competition or antitrust law infringements are protected far more extensively than otherwise. This can be justified by arguing that it no longer appears appropriate or reasonable for the injuring party to be protected against the opening of the floodgates of compensation duties due to the impairment of pure economic interests in this context: the potential injuring parties are not burdened by additional duties to behave in a certain way to avoid injuring someone; rather the duty to compensate the victim is linked to the infringement of already existing duties to act in a certain way in order to protect others and ultimately the market. Further, the injuring parties are only burdened with the duty to compensate for pure economic damage within a relatively narrow scope, ie where there is substantial public interest to compensate. It must be emphasised that this increased protection of individual interests due to the enforcement of public interests does not conflict in any way in principle with the standard of mutual justification of private law claims: on the one hand, those entitled to compensation have really suffered damage and the redressing of such is objectively absolutely justifiable since interests recognised by the legal system have been injured; on the other hand, it no

281 On this see in the German-speaking literature above all the impressive work by *Poelzig,* Normdurchsetzung durch Privatrecht (2012).

282 On this *Basedow,* Entwicklungslinien des europäischen Rechts der Wettbewerbsbeschränkungen. Von der Dezentralisierung über die Ökonomisierung zur privaten Durchsetzung, in: Augenhofer (ed), Die Europäisierung des Kartell- und Lauterkeitsrechts (2009) 1; *Becker,* Schadenersatzklagen bei Verstoß gegen das Kartell- und Missbrauchsverbot: Europäische Vorgaben und Vorhaben, in: Augenhofer, Europäisierung des Kartell- und Lauterkeitsrechts 15; *Poelzig,* Normdurchsetzung durch Privatrecht 87 ff, 141 ff; *G. Wagner,* Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe? AcP 206 (2006) 389 ff.

long appears appropriate to protect the injuring parties against being burdened with having to compensate pure economic interests as they have in any case acted unlawfully and the weight of the public interest in the values at issue also has an impact.

8/161 Nonetheless, concerns must be expressed if it is inferred that because there are often deficits in enforcement when it comes to *»scattered damage«* (widespread, small losses), such claims must exceed compensation in order to have corrective influence on behaviour[283]. It must be emphasised that awarding such increased amounts exceeding the compensation of the individual claimant's damage breaks with the principle of mutual justification[284]. Just as awarding punitive amounts going beyond compensation cannot be justified in private law, neither can awarding amounts exceeding compensation be justified by the notion of deterrence. The claimant has no entitlement whatsoever to receive such amounts. Neither is it possible even to guess during the case of the first claimant which amounts should then be payable on grounds of deterrence as it cannot be foreseen how many claimants in total will assert claims and which deficits in enforcement will ultimately arise. Moreover, it must be borne in mind that illogical consequences result if the first claimant receives a significantly increased sum but subsequent claimants do not.

8/162 Therefore, caution must be exercised in order to avoid any undifferentiated *»monoculture«* which, at all costs, seeks to accomplish all goals via the law of damages; the remedy for such deficits in enforcement must therefore be sought by other means, for example via disgorgement of profits[285] or via claims brought by associations *(Verbandsklagen)*[286]. Furthermore, it must be remembered that there are no such concerns regarding preventive and reparative injunctions as these do not bestow any unjustified benefit upon the claimant.

4. Deterrence by compensation of damage

8/163 It must be underlined that all the arguments against the deterrent function of »Schadenersatzrecht« – the law of compensation – in the Continental European sense are directed solely against the idea of a primary or even only deterrent func-

283 See *Poelzig,* Normdurchsetzung durch Privatrecht 433 ff, in particular 477 ff.

284 On this principle, which *Poelzig,* Normdurchsetzung durch Privatrecht 28 f, recognises but then fails to take into adequate consideration in respect of payments exceeding compensation, see Basic Questions I, no 2/59 with additional references; further *Weinrib,* Corrective Justice, in particular 2 ff, 15 ff, 35 f.

285 On this *Poelzig,* Normdurchsetzung durch Privatrecht 494 ff; *Stadler,* Der Gewinnabschöpfungsanspruch: eine Variante des *private enforcement?* in: Augenhofer (ed), Die Europäisierung des Kartell- und Lauterkeitsrechts 117; *Wagner,* AcP 206, 374 ff; see on this also below no 8/171 ff.

286 *Augenhofer, Private enforcement:* Anforderungen an die österreichische und deutsche Rechtsordnung, in: Augenhofer (ed), Die Europäisierung des Kartell- und Lauterkeitsrechts 39; *Wagner,* AcP 206, 407 ff; see on this also no 8/172 f.

tion, but not against a *secondary function*[287]*:* as already mentioned, it is broadly accepted that tort law also – as a side effect – has a deterrent function. The threat of a duty to compensate in the event of damage being caused undoubtedly provides a general *incentive to avoid inflicting damage.* With respect to the specific tortfeasor who has already caused harm and thus been held liable for compensation, it provides motivation to avoid causing damage as far as possible in future.

8/164 The deterrent function further founds the basis of the idea of continuation or continuing effect of a right or interest[288] which is thought to provide affirmation for the *objective-abstract assessment of damage.* Specifically, the notion of continuation of a right sees the injured right or legal good as surviving in a claim for compensation: in lieu of the destroyed good, a claim against the damaging party arises. As the legal system protects rights and legal goods based on their general appreciation in the legal community, the notion of continuation of a right leads to a claim for compensation for the »ordinary value«, ie the market value, regardless of the concrete interest of the owner who suffered the loss. Thus, the notion of continuation of a right secures the emergence of a duty to compensate[289] provided the other relevant criteria for imputation are satisfied and by this ensures that: the damaging party must compensate as *minimum damage* the objective-abstract value loss, at least if the destroyed or damaged good enjoyed general appreciation, and even if the subjective damage is less or the damage has been shifted. This safeguarding of the duty to compensate reinforces the incentive to avoid inflicting damage.

8/165 I think that these ideas should be taken up in the discussions on future harmonisation. This has already been done by the European Group on Tort Law and its considerations manifested themselves in art 10:201 PETL: »Such damage is generally determined as concretely as possible but it may be determined abstractly when appropriate, for example by reference to a market value.«

5. Tort law's deterrent effect and liability insurance

8/166 From the perspective of the law of tort, mandatory or voluntary third-party liability insurance has an ambivalent aspect[290]. One less pleasing consequence of

287 See *Moréteau,* France no 1/7; *Koziol,* Prevention under Tort Law from a Traditional Point of View, in: Tichý/Hrádek (eds), Prevention in Law (2013) 135 ff.

288 On this in more detail Basic Questions I, no 3/8 ff, as well as my article on Prevention under Tort Law from a Traditional Point of View, in: Tichý/Hrádek (eds), Prevention in Law 155 ff.

289 In the same sense *Moréteau,* France no 1/70.

290 For an impressive account on this see *Cousy,* Tort Liability and Liability Insurance: A Difficult Relationship, in: Koziol/B.C. Steininger, European Tort Law 2001 (2002) 18 ff. See further *Hinteregger,* Die Pflichthaftpflichtversicherung im Schadensrecht – eine funktionelle Analyse, Reischauer-FS (2010) 513 f; *G. Wagner,* Comparative Report and Final Conclusions, in: G. Wagner (ed), Tort Law and Liability Insurance (2005) 338 ff.

third-party liability insurance is the fact that it at least considerably *impedes* the *deterrent secondary-function* of the law of tort, possibly even eliminates it[291], as far as the insurance provides cover for the compensation: it can be assumed that the incentive to avoid causing damage is lower the less that the injuring party will be burdened with the duty to compensate. If someone has third-party liability insurance, liability to pay damages will hardly affect him financially, as far as liability for negligent conduct and strict liability is at stake.

Nevertheless, these arguments should not be interpreted as a call to prohibit **8/167** third-party liability insurance as much as possible. It must be taken into consideration that even in the absence of third-party liability insurance, there may be no deterrent effect. For example, if the impending duty to compensate constitutes no burden to the injuring party due to his wealth; or alternatively if he will not be in any position to fulfil his duty to compensate anyway because he has no assets. Moreover, the positive aspect of third-party liability insurance in relation also to the victim must not be overlooked[292]: third-party liability insurance serves the interests of victims as it secures the compensation payments; hence, it serves the compensatory and thus the primary function of the law of tort[293]. Third-party liability insurance is therefore highly desirable and in many cases even prescribed as compulsory for this reason[294], particularly in the context of motor vehicle liability. It must also be borne in mind that third-party liability insurance is absolutely essential for *entrepreneurs* in order to facilitate the calculation of risks.

Thus, it may be said that third-party liability insurance promotes the *compen-* **8/168** *satory function* – which is primary to the law of tort – but is detrimental to the ancillary *deterrent purpose.* This negative aspect can and should, however, certainly be mitigated and therefore third-party liability insurance should, as far as possible, be designed so as not to undermine the deterrent function of the law of tort. This could be achieved, inter alia, by means of deductibles and premiums determined by the bonus-malus system[295].

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291 Cf *Moréteau,* France no 1/51; in more detail *von Bar,* Das »Trennungsprinzip« und die Geschichte des Wandels der Haftpflichtversicherung, AcP 181 (1981) 311 ff; *van Boom,* Compensating and Preventing Damage: Is there any Future Left for Tort Law? in: Essays on Tort, Insurance, Law and Society in Honour of Bill W. Dufwa (2006) 288 f; *Scheel,* Versicherbarkeit und Prävention (1999) 181 ff, 270; *Schlobach,* Das Präventionsprinzip im Recht des Schadensersatzes (2004) 318 ff, 413 f.

292 Cf on this *Baker,* The View of an American Insurance Law Scholar: Six Ways that Liability Insurance Shapes Tort Law, in: Wagner (ed), Tort Law and Liability Insurance 297 f; *Hinteregger,* Reischauer-FS 511 ff; *Lewis,* The Relationship Between Tort Law and Insurance in England and Wales, in: Wagner (ed), Tort Law and Liability Insurance 48 f, 51 f.

293 Cf *F. Bydlinski,* System und Prinzipien des Privatrechts (Nachdruck 2013) 113 f.

294 See on this with further details *Faure,* The View from Law and Economics, in: Wagner (ed), Tort Law and Liability Insurance 240 ff; *Hinteregger,* Reischauer-FS 507 ff.

295 Cf *Rodopoulos,* Kritische Studie der Reflexwirkungen der Haftpflichtversicherung auf die Haftung (1981) 45; *Faure* in: Wagner (ed), Tort Law and Liability Insurance 265 ff; *Schlobach,* Präven-

6. A need for additional instruments of deterrence?

8/169 It is often bemoaned that tort law does not have a sufficiently deterring effect because, even after fulfilling his compensation duties, the tortfeasor still retains a benefit as a result of his unlawful interference. In particular in respect of infringements of intellectual property[296], the further difficulty of proving the extent of the damage, the inadequate enforceability of compensation claims and thus the shortcomings of tort law are criticised[297]. In the case of »scattered« damage or very minor damage, the complaint is that there is, moreover, not enough incentive for the victim to pursue his compensation claims with the result that the tortfeasor largely escapes his duties to compensate and as a result of this enforcement deficit the deterrent effect is lost[298]. Ultimately, the substantial decrease in the deterrent effect of having to pay compensation due to third-party liability insurance[299] is pointed out.

8/170 The argument that tort law often cannot fulfil all legitimate expectations – in particular in relation to a powerful deterrent effect – cannot be completely denied. However, it must be remembered that some expectations far exceed what tort law is either intended to or can achieve given its fundamental conceptions and its aims, and it must be noted that Continental European legal systems provide for a *myriad of other legal instruments* apart from the law of damages, with different functions and thus additional deterrent effects[300]. Hence, before we can speak of deficits in regulation, we must firstly take account of the limits inherent in the law of damages, and secondly the *interplay* of all the other instruments. The law of damages after all is only one of many protective mechanisms in the overall framework of our legal systems; therefore, it should and can only cover a part of the required protection of interests. There is clearly not enough awareness of the importance of a general overview in particular in the common law, as a result of the isolated analysis of the law of torts; but even in Continental Europe it is often neglected.

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tionsprinzip 318 f, 415; *Hinteregger,* Reischauer-FS 517 f; *Wagner,* Tort Law and Liability Insurance, in: Faure (ed), Tort Law and Economics (2009) 391.

296 In the case of unauthorised use of mass transportation means there are similar problems; hence, the Railway Transport and Passengers' Rights Act *(Eisenbahnbeförderungs- und Fahrgastrechtegesetz)* 2013 in Austria stipulates that people who travel without a valid ticket must pay »accompanying charges«, which qualify as compensation. See on this *Reiter,* Das EisbBFG: Strafschadenersatz, Fahrgastrechte und die neue Verwaltungsgerichtsbarkeit, wirtschaftsrechtliche blätter (wbl) 2014, 76 f.

297 Basic Questions I, no 2/56.

298 On this *G. Wagner,* Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden, Gutachten A zum 66. Deutschen Juristentag 2006 (2006) 100 ff.

299 Basic Questions I, no 2/70.

300 On efforts towards developing further deterrent instruments in private law, see *van Boom,* Prevention through Enforcement in Private Law, in: Tichý/Hrádek (eds), Prevention in Law (2013) 31.

8/171 In fact legal systems have a whole arsenal of very different weapons available under *private, administrative and criminal law* to serve the protection of rights and interests in very different ways: by defending such against threatened endangerment, by compensating losses, by returning unjust enrichment, by disgorgement of profits in favour of the public purse or by the imposition of penalties for infringements attempted or committed[301]. With regard to prevention, the following have to be mentioned in particular: preventive injunctions[302], the right to self-defence and reparative injunctions which also help to hinder the occurrence of further harm[303]. Last but not least, reference is made to the fact that the aim of deterrence – independently of the notion of compensation – is also pursued above all by criminal law; hence, private law measures should never be viewed in isolation. This must be borne in mind, for example, when supporters of the economic analysis of law[304] complain that killing a person does not involve any consequences under tort law[305] unless there are surviving dependants to whom the deceased had a duty to make maintenance payments: in reality – when the overall legal system is taken into account – there is no gap in protection as criminal law comprehensively protects human life[306].

8/172 As far as deficits in enforcement are concerned when it comes to *»scattered«* or *very minor damage,* effective tools have been created in some legal systems, at least for special areas in which the shortcomings of the law of damages were particularly noticeable. These approaches are based on ideas that are capable of being generalised beyond their existing application to other situations. Particularly worthy of attention is an association's claim for *disgorgement of profits* introduced by § 10 of the Unfair Competition Act (UWG) in 2004 in Germany[307]; this revolu-

301 On some questions in more detail *Koziol,* Gedanken zum privatrechtlichen System des Rechtsgüterschutzes, Canaris-FS I (2007) 631. See further the detailed comparative analysis in *von Bar,* The Common European Law of Torts I (1998) no 411 ff.

302 On this very recently again *Picker,* Prävention durch negatorischen Schutz, in: Tichý/Hrádek (eds), Prevention 61.

303 See in detail *Dreier,* Kompensation und Prävention (2002) 20 ff.

304 See, eg, *Schäfer/Ott,* The Economic Analysis of Civil Law (2004) 235 ff.

305 This applies in any case to German, Austrian and Swiss law, see *Koziol,* Die Tötung im Schadenersatzrecht, in: Koziol/Spier (eds), Liber Amicorum Pierre Widmer (2003) 203 ff. The situation is different, however, under Japanese law, which recognises a compensation claim on the part of the deceased that is passed on to his heirs; see on this *Marutschke,* Einführung in das japanische Recht[2] (2010) 171 f; *Nitta,* Die Berechnung des Schadens beim Unfalltod eines minderjährigen Kindes, in: von Caemmerer/Müller-Freienfels/Stoll (eds), Recht in Japan: Berichte über Entwicklungen und Tendenzen im japanischen Recht (1998) 77 ff.

306 *Koziol* in: Koziol/Spier (eds), Liber Amicorum Pierre Widmer 206; thus also *B.A. Koch,* Der Preis des Tötens, in: Ganner (ed), Die soziale Funktion des Privatrechts, Barta-FS (2009) 189; *Kötz/G. Wagner,* Deliktsrecht[12] (2013) no 742.

307 For a recent piece of work on this see *Alexander,* Schadensersatz und Abschöpfung im Lauterkeits- und Kartellrecht, Privatrechtliche Sanktionsinstrumente zum Schutz individueller und überindividueller Interessen im Wettbewerb (2012) 501 ff; *Herzberg,* Die Gewinnabschöpfung nach § 10 UWG (2013).

tionary provision was followed somewhat later by § 34a of the German Act against restraints on Competition (GWB)[308]. Under these provisions it is possible for certain consumer protection associations to sue those who engage in certain inadmissible business practices intentionally and in this manner gain a profit at the expense of a multitude of customers for disgorgement of this profit in favour of the public purse. It must be noted that the legislator rightly took into account that these claims are not about enforcing individuals' interests but have an overall regulatory effect for society[309], and thus the amounts disgorged cannot be allowed to flow to individuals. Therefore, in harmony with the applicable principle of mutual justification in private law, this law avoids handing out objectively unjustified windfalls to individuals but ensures that their damage is compensated.

8/173 For a more general rule obviously some corrections would need to be made[310]. For example, the restriction to intentional behaviour is not justifiable when it comes to claims for unjust enrichment, rather these should be granted in the case of any interference in interests that are comprehensively protected or at least protected against certain types of behaviour. The *association's claim* should be expanded in the case of »scattered« or very minor damage and thus apply also in line with the general rules. It should also apply in the case of negligent behaviour or when there is strict liability. Offering associations greater incentives to bring lawsuits should also be considered, for instance by making a greater part of the amount in question available to them for further relevant activities.

8/174 If there is still a need for further sanctions after this, then – due to the private law principle of mutual justification – an extension of the *criminal law* and also administrative penal law must be considered first. Insofar as there are legitimate concerns about over-burdening the criminal and administrative courts, *interim solutions* between private and criminal law could be considered, taking account of both the structural principles of private law and also of criminal law. Therefore, such would have to avoid infringing the principle of mutual justification and thus also any unjustifiable windfall to the claimant[311], by giving private associations the standing to make a claim like in the disgorgement of profit action under § 10 of the German Act on Unfair Competition (UWG) as well as under § 34a of the German Act against restraints on Competition (GWB) but also in accordance with other European models[312] and having the fines paid out to the state, social insti-

308 On this *Alexander,* Schadensersatz und Abschöpfung 578 ff.

309 Thus, *Alexander,* Schadensersatz und Abschöpfung 478 ff.

310 Thus, for example, also *Herzberg,* Gewinnabschöpfung 547 ff.

311 On its development see *Jansen* in: Schmoeckel/Rückert/Zimmermann (eds), Historisch-kritischer Kommentar zum BGB II (2007) §§ 249–253, 255 nos 17 f, 21, 61. On the case law of the BGH cf *Dressler,* Schadensausgleich und Bereicherungsverbot, G. Müller-FS (2009) 11 ff.

312 See furthermore the ideas presented by *van Boom,* Efficacious Enforcement in Contract and Tort (2006) 29, 33.

tutions[313] and consumer protection associations. As these would be real fines and not compensation or disgorgement of profit, however, it would also be necessary to make sure in such proceedings that the procedural principles of criminal law, which serve the protection of the accused, are observed; moreover, regard would have to be had to the principle that, in criminal law, sanctions can only be imposed on the basis of explicit provisions, so that any drawing of analogies would be problematic.

II. Economic optimisation

8/175 The country reports do *not* ascribe decisive importance to the economic analysis of law, at most the results of such are given joint consideration with other aspects. In France it is highlighted that the view »that figures cannot explain everything, that reality cannot be reduced to mathematical formulae is a good reflection of French skepticism: the law and economics creed that human activity is driven by maximisation of wealth is oversimplistic and cannot explain everything. It is either ignored or rejected by most scholars«[314]. In respect of Norway, in turn, it is noted that: »The prevailing view seems to be that law and economics operates with oversimple and general presuppositions and that the rationality does not capture the moral questions that are inherent in tort law. Still, in certain areas the insights of economics can no doubt be helpful; however, not as a replacement for tort law but only as a supplement to tort law reasoning«[315]. This corresponds largely to the Hungarian standpoint[316]. Very much in the same direction ultimately comes *Oliphant's* statement[317]: »modern law and economics has not gained much of a foothold amongst tort lawyers in England or elsewhere in the Commonwealth.«

8/176 *Green/Cardi*[318] write that the sole validity of economic analysis is hardly supported in their home country any more either; instead a law and economics analysis tends to proceed along the lines that: »if we wish to take efficiency into account, this is how the law might be structured.« However, they stress the importance of economic analysis in relation to its emphasis on the notion of deterrence.

313 Cf *Ben-Shahar,* Causation and Foreseeability, in: Faure (ed), Tort Law and Economics 99 f, who clearly wants to provide for this very generally in cases in which the payment exceeds the actual damage.

314 *Moréteau,* France no 1/68.

315 *Askeland,* Norway no 2/33.

316 *Menyhárd,* Hungary no 4/59.

317 *Oliphant,* England and the Commonwealth no 5/58; see also *Lobban,* English jurisprudence and tort theory, in: Lobban/Moses (eds), The Impact of Ideas on Legal Development (2012) 145 ff.

318 *Green/Cardi,* USA nos 6/61 and 63.

Furthermore, *Green/Cardi* write: »One major improvement in the work of economic analysis of law that has developed over the past several decades is the development and use of behavioral economics.«

8/177 **Conclusions:** Apart from the energetic minority in Germany, all legal systems covered seem to support moderate joint consideration of economic aspects but to reject their sole applicability. This seems a perfectly appropriate approach, avoiding any monocultures[319], which could meet with general approval.

319 See Basic Questions I, no 3/29; *Koziol* in: Tichý/Hrádek (eds), Prevention in Law (2013) 138 ff.

Part 4 The area between tort and breach of an obligation

I. Comparative law overview

Delictual liability is often compared to *contractual liability.* This distinction is common in all the legal systems discussed here and is also highly significant[320]: contractual liability is much more wide-ranging than delictual as it either provides for a reversal of the burden of proof in relation to fault or even for liability independent of fault; many legal systems provide for a more extensive liability for auxiliaries in the contractual area than in the delictual and finally contractual rules usually allow the recovery of pure economic damage. Nevertheless, special attention is rarely given to the reasons behind the different structures or to the boundaries between the two[321]. **8/178**

As the comparative law overview shows *culpa in contrahendo,* ie the infringement of pre-contractual duties to protect the others' interests, is often given a special position[322] with the compensation of pure economic damage being accepted; predominantly, however, pre-contractual infringements are counted as delicts[323] and any other interim stages or transitions are not elaborated but instead specific groups of cases are assigned solutions under the law of contracts or delicts without any regard to the bigger context[324]. There are also differences insofar as some jurisdictions allow the claimant to choose between actions under contractual and delictual law[325], in particular in France any accumulation of claims is rejected[326]. In Poland, as in the German legal family, the two types of claim are very different **8/179**

320 See, for example, *Moréteau,* France no 1/72 ff; *Askeland,* Norway no 2/38.

321 *Askeland,* Norway no 2/38; *Ludwichowska-Redo,* Poland no 3/52 ff; *Menyhárd,* Hungary nos 4/13 and 61 f.

322 *Ludwichowska-Redo,* Poland no 3/52; *Menyhárd,* Hungary no 4/68. See also the reference for *Oliphant,* England and the Commonwealth no 5/65.

323 *Moréteau,* France no 1/84 (distinguishing); *Askeland,* Norway no 2/36; *Ludwichowska-Redo,* Poland nos 3/52 and 60; *Yamamoto,* Japan no 7/187 ff. According to *Menyhárd,* Hungary no 4/68, in cases where no contract is subsequently concluded.

324 *Askeland,* Norway no 2/34 ff; cf also *Moréteau,* France no 1/80 ff. The interim position between contract and delict, on the other hand, is pointed out by *Jansen,* The Concept of Non-Contractual Obligations: Rethinking the Divisions of Tort, Unjustified Enrichment and Contract Law, JETL 2010, 40 ff.

325 *Askeland,* Norway no 2/34; *Ludwichowska-Redo,* Poland no 3/59; *Menyhárd,* Hungary no 4/69.

326 *Moréteau,* France no 1/86; *Menyhárd,* Hungary no 4/61 f.

when it comes to distribution of the burden of proof, the recoverable damage and liability for auxiliaries, and sometimes also in respect of prescription[327].

8/180 Neither is the position in the USA so different: *Green/Cardi*[328] note that tort law and contract law are treated as distinct subjects in US law and that American lawyers would not contrast and compare the obligations imposed by tort and contract. »Rather, the US legal system considers tort obligations to be ones imposed by law to address relations among strangers. By contrast, contractual obligations are matters of voluntary agreement that arise from that agreement.« In stating this, however, the US report does not take into consideration that the obligations imposed on the parties to compensate the damage caused to the other are not predominantly based on a concrete agreement of the parties but on law; only in a few cases do parties design provisions on liability.

8/181 *Green/Cardi* further point out that US law also encounters cases in which both tort law and contract law could apply. Product liability and medical malpractice are such important areas. For historical reasons, in the US, professional malpractice is governed by tort law and is not a matter for contract law. On the other hand, in product liability, a victim may assert either tort claims or warranty claims.

II. Opinion

8/182 In order to better understand the relationship between contractual and delictual liability, it is necessary to look more closely at the core areas in both types of liability, their delineation, the material principles behind them and thus also the significance of the distinction between the two fields of liability[329].

8/183 A clear part of the core area of *contractual liability* is constituted by infringements of the duty to render performance. In this context the *notion of guarantee* – more strongly developed in common law[330], in France in the form of the »obligation de résultat«[331] and also in the United Nations Convention on Contracts for the International Sale of Goods (CISG)[332] – plays a role[333]: if the obligee undertakes to

327 *Ludwichowska-Redo,* Poland no 3/54.
328 *Green/Cardi,* USA no 6/66.
329 See also *Moréteau,* Revisiting the Grey Zone between Contract and Tort: The Role of Estoppel and Reliance in Mapping out the Law of Obligations, in: Koziol/B.C. Steininger (eds), European Tort Law 2004 (2005) 60 ff.
330 *Beale* in: Beale (ed), Chitty on Contracts I[31] (2012) para 26-001 ff; *McKendrick* in: Burrows (ed), English Private Law[3] (2013) no 8.407 ff.
331 *Moréteau,* France no 1/74.
332 *Köhler,* Die Haftung nach UN-Kaufrecht im Spannungsverhältnis zwischen Vertrag und Delikt (2003) 122 ff.
333 See *Larenz,* Lehrbuch des Schuldrechts[14] I (1987) 278.

render some particular performance, even in legal systems that do not proceed on the basis of a guarantee undertaking, this is nonetheless seen as a type of recognition of the ability to perform, which admittedly does not have the power to trigger liability based on guarantee and independent of fault but does allow the assumption that non-performance is attributable to misconduct on the part of the obligee; the obligee, who does not render the promised performance, must thus prove that he has not breached any duty of care. In this respect, contractual liability is stricter than delictual. Besides this, it must be remembered that in the case of contractual relationships, each partner exposes his sphere more openly to the possible influence of the other and thus is exposed to increased risk towards his person and legal goods. Some legal systems hold that this increase in risk may lead to a tightening of liability by introducing a presumption of fault.

8/184 Moreover, this risk posed to the other in the context of contractual relationships aimed at exchanging performance occurs in the pursuance of each partner's own *business interest.* If a party is exposed to greater risk by pursuance of another's business interests, increased duties of care are reasonable and these also lie in both parties' interest to minimise damage as far as possible. Therefore, firstly, an increased standard of care, secondly, duties to take action, and thirdly a duty to have regard to the pure economic interests of the other may be imposed on each contractual partner[334]. In particular the more extensive contractual liability for pure economic loss is extremely important in practice.

8/185 In those legal systems that do not have comprehensive liability in the delictual area for principals in respect of their *auxiliaries*[335], such liability is stricter within contractual relationships: whoever can and may increase his economic benefit and economic potential by using auxiliaries also ought to bear the losses associated with using these auxiliaries. It must also be borne in mind that the position of the obligor would be considerably weaker as a result of auxiliaries being used if the obligee was only liable in the case of fault in selection or supervision of the auxiliaries. The auxiliaries, who are not bound by the contractual obligations, are only subject to the general delictual liability[336].

8/186 In some legal systems, classification under contractual or delictual liability has a considerable practical impact because different rules on *prescription* come into play[337].

8/187 Although strictly speaking there is only a breach of contract when – privately and autonomously agreed – duties to perform are not discharged, there is a strong

334 Basic Questions I, nos 4/5 and 53.
335 Basic Questions I, no 4/4; *Yamamoto,* Japan no 7/175. See also the recent publication by *Ondreasova,* Die Gehilfenhaftung (2013) 47 ff, 97 ff.
336 Basic Questions I, no 6/105 f.
337 This is highlighted in particular in Japanese law: *Yamamoto,* Japan no 7/189.

tendency, in particular in the German-speaking jurisdictions but also in France to some extent[338], to apply contractual rules, which are much more favourable to the victim, even when the protection of the legal goods of the partner and thus his *Integritätsinteressen* (interests in integrity) are at stake. A good example is provided by cases of *culpa in contrahendo,* ie the infringement of pre-contractual duties of care, including special duties of care established by business contact. Although no contract has yet been concluded, far-reaching duties of care are assumed between the partners and when these are infringed, the rules of contractual liability are applied, in particular in relation to extensive liability for auxiliaries and for pure economic loss. As already mentioned, in the majority of legal systems, cases of culpa in contrahendo are assigned to the delictual field but accorded a special status. Whether in such cases they are discussed under contractual or delictual liability or under an interim area is more a question of terminology. In essence the issue is the recognition that general delictual liability[339], which is relevant when it comes to compensating the infringement of the *Integritätsinteressen,* can be equated with or approximated to contractual liability when the material factors behind the stricter nature of contractual liability are equally or partially relevant in this context.

8/188 A further example relevant in practice is offered by *prospectus liability* on the part of the party that draws up a prospectus in relation to the addressees, who usually are not contractual partners of the former. Nonetheless, far-ranging liability for pure economic loss and the application of the contractual rules on liability for auxiliaries, in particular, are endorsed. The reason behind this is that the party responsible for the prospectus presents himself as an expert in the matter and directs his representations in his own interest at interested third parties whose trust and reliance he wishes to procure in order to influence how they act. Thus, prospectus liability is a sub-category of liability for breach of trust or reliance, which covers constellations of interests which come close to those when contracts are concluded[340].

8/189 In my opinion the above-described *interim area* between contractual and delictual liability or – put differently – the legitimate way in which some cases of delictual liability can be approximated to contractual liability should not present any impossible obstacles, at least not in Europe, to harmonisation of the various positions. On the one hand, there has not yet been any really comprehensive dis-

338 *Moréteau,* France no 1/80 f.

339 The consistency of the protection for Erhaltungsinteressen in and outside special relationships is emphasised by *Katzenstein,* Haftungsbeschränkungen zugunsten und zulasten Dritter (2004) 161 ff.

340 *Canaris,* Schutzgesetz – Verkehrspflichten – Schutzpflichten, Larenz-FS (1983) 91 ff; *Kalss,* Die rechtliche Grundlage kapitalmarktbezogener Haftungsansprüche, Österreichisches Bank Archiv (ÖBA) 2000, 648 ff.

cussion in most legal systems to date but, accordingly, neither have any clear positions been firmly established. On the other hand, there is, generally speaking, adequate flexibility for objectively satisfactory solutions in the interim area at issue: in any case the legal systems often already base decisions in this context on the above-mentioned factors, which are those which support the idea of tighter liability under contracts than with respect to normal delictual liability. When establishing the duties of care, for instance, the basis is often a particularly close relationship and the degree of endangerment; compensation for pure economic loss is awarded under consideration of various different factors, whereby, inter alia, procuring trust in declarations is significant; departures from the basic burden of proof rule are often allowed or in essence allowed by admitting prima facie evidence. There are differences with respect to liability for auxiliaries in the contractual and delictual areas only in some legal systems, so that no general problem is presented here; however, in the legal systems that do distinguish in this respect it would be necessary to work out exceptions in some cases.

Part 5 The basic criteria for a compensation claim

I. Damage

A. Comparative review

8/190 When reference is made in the German speaking legal systems to the *law of damages,* it is clear that this means the field of rules that provide for the compensation of damage sustained where the basic prerequisite consisting in causation of the damage as well as more or less generally defined grounds for imputation, in particular fault liability, vicarious liability and strict liability, have been met (see § 823 para 1 of the German Civil Code, BGB, § 1295 para 1 of the Austrian Civil Code, ABGB, art 41 para 1 of the Swiss Code of Obligations, OR)[341]. This is in line with the emphasis on the notion of compensation in these countries[342]. As this field always concerns a homogenous legal consequence with fixed content, specifically the compensation of damage caused, from the point of view of the basic prerequisite – causation of harm – and the legal consequence – compensation of said harm – this is a very homogenous field of law: the law of damages covers all those rules that govern the prerequisites for and content of the claims directed at compensation of damage. The same is true too of the other Continental European legal systems that have likewise developed the law of damages as a separate legal institution, directed at the compensation of damage sustained[343]. In all these legal systems, therefore, case law and teaching have, as would be expected, examined the concept of damage and the different types of damage, at least in outline. Essentially, the premise is a concept developed by law and damage is understood as a detrimental, legally relevant change to protected interests, though above all a distinction is drawn between pecuniary and non-pecuniary harm[344]. Lastly, it is worth mentioning that PETL in art 2:101 even give a comprehensive definition of damage as: »material or immaterial harm to a legally protected interest«. Art VI.–

341 See also *Koziol, Schadenersatzrecht* and the Law of Torts: Different terms and different ways of thinking, JETL 2014, 260 on this.

342 On this see no 8/146 ff above.

343 The compensatory function is emphasised in France; in particular, see *Moréteau,* France nos 1/64 ff, 107. An overview is offered by the country reports under General Overview (chapter 1) in: Winiger/Koziol/Koch/Zimmermann (eds), Digest of European Tort Law II: Essential Cases on Damage (2011).

344 *Moréteau,* France nos 1/65 ff and 91 ff; *Askeland,* Norway no 2/40 ff; *Ludwichowska-Redo,* Poland no 3/61; *Menyhárd,* Hungary no 4/70 ff. On further legal systems see the country reports in: Winiger/Koziol/B.A. Koch/Zimmermann (eds), Digest II: Damage.

2:101 DCFR gives a description of »legally relevant damage«. In this respect it is noteworthy that when no express rule provides for it, pursuant to para 2, »loss or injury constitutes legally relevant damage only if it would be fair and reasonable for there to be a right to reparation or prevention«. Hence, the provision does not ask which damage is recoverable but stipulates that the result of the examination of all the prerequisites for imputation in respect of »loss or injury« is deemed to be the damage.

8/191 According to *Green/Cardi,* the situation in the USA is not very different[345]: »Much of the general description of damage, recoverable damage, and pecuniary and non-pecuniary damage in Basic Questions comports with US law, although ›harm‹ is often the term employed to describe these detriments. Tort law in the US also permits recovery only for legally cognizable harm.«

8/192 In respect of English law, however, *Oliphant*[346] highlights very significant differences: »There is no general concept of ›damage‹ in English tort law, and academic discussions of the topic have been few in number, but damage does play an important role in most torts recognised by English law. As there are, according to one estimate, some 70 or more torts recognised by the common law, it could be said that there are in fact 70 or more different conceptions of damage in English tort law[347]. That is to overstate the case somewhat, but it gives some indication of the difficulty facing an English lawyer in this area. It by no means follows that what is recognised as damage in Tort A is so recognised in Tort B.« This in turn is no doubt connected with the fact that torts actionable per se (eg trespass) do not require any damage but merely an interference and thus are not aimed at compensating damage either; furthermore, injunctions, both preventive and reparative, are also covered by the law of torts although they do not require the occurrence of any damage and are not directed at compensating damage but at preventing or removing some interference. Therefore, this lack of distinction between the legal instruments according to their tasks, prerequisites and legal consequences means damage cannot be recognised as a general prerequisite in the field of the law of torts and is an obstacle to the discussion of the types, differences and common features of any such prerequisite of damage.

8/193 Once again it is apparent[348] that the extended, diverse field of the law of torts under the common law can by no means be equated with the laws of damages in Continental Europe. Only that – admittedly major – part of the law of torts in which the occurrence of damage is required and compensation of such is stipu-

345 *Green/Cardi,* USA no 6/70.

346 *Oliphant,* England and the Commonwealth no 5/66 f; likewise *Oliphant,* General Overview, England and Wales, in: Winiger/Koziol/Koch/Zimmermann (eds), Digest II: Damage 1/12 no 1; see also *Nolan,* Damage in the English Law of Negligence, JETL 2013, 259.

347 *B. Rudden,* Torticles (1991–1992) 6/7 Tulane Civil Law Forum (Tul Civ LF) 105.

348 See no 8/29 above; further *Koziol,* JETL 2014, 260 ff.

lated as the legal consequence can be equated with the field of extra-contractual liability for damage. Only that area can thus ultimately be included in the elaboration of common features and differences in this investigation. In respect of this part of the law of torts, which is directed at the compensation of harm caused, it must also be possible to draw a more general outline of damage for English law and elaborate the different types of damage.

8/194 In some of the legal systems discussed here it is emphasised that recoverable pecuniary damage basically includes both actual loss (damnum emergens) and loss of profit (lucrum cessans)[349]. Because of the principle of full compensation, however, this distinction often does not play any particular role except in connection with the question of whether pure economic loss is recoverable[350]. »Real damage« is also mentioned occasionally[351]. It can be relevant particularly in connection with restitution-in-kind. By contrast, the distinction between pecuniary and non-pecuniary damage is familiar to all the legal systems; in this respect the special nature of non-pecuniary damage is generally highlighted and it is indicated that courts are cautious about awarding compensation for it[352]; as such in France concerns about converting suffering into money also exist. In some legal systems it is argued that the remedy is not a simple compensation of damage but a different type of indemnification[353].

B. Conclusions

8/195 It must be stressed yet again that only that part of the law of torts may be included in the investigation which has compensatory damages as the legal consequence and thus, as in the Continental European laws of damages, deals with the compensation of damage caused.

8/196 Insofar as the understanding of *pecuniary damage* is the subject of discussion, there do not really seem to be any unbridgeable gaps; only clearer elaboration could present difficulties. In the case of *non-pecuniary damage,* however, more fundamental questions arise.

8/197 Firstly, even a clear *delineation* of what comes under the heading of non-pecuniary damage meets with obstacles. Nonetheless, it seems necessary to distinguish between pecuniary and non-pecuniary damage since – as will be discussed

349 *Ludwichowska-Redo,* Poland no 3/74; *Menyhárd,* Hungary no 4/70.

350 See *Oliphant,* England and the Commonwealth no 5/75.

351 *Askeland,* Norway no 2/41.

352 *Moréteau,* France nos 1/65 and 96 ff; *Askeland,* Norway no 2/50; *Ludwichowska-Redo,* Poland no 3/64; *Menyhárd,* Hungary no 4/71; *Green/Cardi,* USA no 6/71 ff.

353 *Menyhárd,* Hungary no 4/71 f. In French law too, there are voices that echo this idea; cf *Moréteau,* France nos 1/65 and 97.

in more detail directly below – a widespread reservation regarding the compensation of non-pecuniary damage in comparison to damages for pecuniary damage can be discerned. The boundary between the two types of damage and the elaboration of the grounds for the distinction are thus necessary given the different legal consequences. Only when there is clarity about this will it be possible to halt fraudulent labelling, which is resorted to in order to try and close – supposed or real – gaps in protection in the case of non-pecuniary damage, and to ensure results that conform to underlying value judgements. As can be seen especially in German law – but sometimes under other legal systems too – non-pecuniary damage is not infrequently labelled as pecuniary damage in order to achieve the desired recoverability[354]. Simply re-labelling the damage cannot, however, be a convincing solution; rather it must be questioned whether there are sufficient grounds for awarding compensation for non-pecuniary damage in such cases, although it would not be recoverable under the general laws. In this respect, it is of course right and proper to base this evaluation on the values which underlie the statutory or court-made rules. Thus, for example, if certain forms of non-pecuniary damage can typically be assessed on the basis of objective criteria, this can justify an expansion of its recoverability[355].

8/198 A further issue is whether damages for non-pecuniary damage serve to *compensat*e such damage or have another function. Just as in former times German law emphasised the satisfaction function of damages for non-pecuniary damage[356], nowadays Hungarian law has also turned from talking simply of compensation to using the term indemnification[357]. It is certainly true that it is not exactly the same as compensation of pecuniary damage, since the latter can be measured in money and thus also directly compensated in money, whereas this is per definitionem not the case with non-pecuniary damage. In the case of non-pecuniary damage, therefore, a monetary payment can only provide a remedy by making funds available with which – roughly speaking – the victim is put into a position in which he can obtain non-pecuniary benefits as compensation for the non-pecuniary harm. Whether one then says that this no longer constitutes compensation per se but rather indemnification or calls both cases compensation but considers that there are some special features in the case of non-pecuniary damage is more or less a terminological issue and a question of how clearly the distinction is expressed. In fact there would seem to be no real conflict between the two viewpoints.

354 Basic Questions I, no 5/23 ff; see also *Askeland,* Norway no 2/48; *Ludwichowska-Redo,* Poland no 3/67 f; *Green/Cardi,* USA no 6/76. Cf *Oliphant,* England and the Commonwealth no 5/84.

355 Basic Questions I, nos 5/25, 30 f.

356 Basic Questions I, no 3/3.

357 *Menyhárd,* Hungary no 4/72.

8/199 Further, while it can be seen that all legal systems display a certain hesitance as regards the *recoverability* of non-pecuniary damage, the limitations are different and sometimes uncertain. At the same time, it is clearly the underlying values that are at issue, regarding how weighty the grounds for this reluctance are considered to be on the one hand, and how worthy of protection the non-pecuniary interests are adjudged to be on the other. Rigid, clearly definable boundaries will be very difficult to find. From an international perspective, there is undoubtedly a general tendency to expand recoverability and, to date, no clear limits have been set. However, the voices warning against over-extending compensation should be given more attention, particulary since the burden of compensation payments already places a worrying burden on freedom of movement: *Green/Cardi*[358] rightly point to the concern expressed by important voices to the effect that »giving legal recognition to emotional harm will increase the extent of it«. This corresponds to an argument that is also familiar in Austria[359]. The impossibility of establishing whether there is in fact non-pecuniary damage and the lack of objectivity in the assessment of such have already been mentioned[360]. Therefore, the Hungarian viewpoint, namely that non-pecuniary damage should only be compensated when there is interference with personality rights[361], is definitely worthy of discussion though an extension in the case of intentional damage would also be worth considering. In any case, these questions concern fundamental value judgements, for which it should be possible to find a compromise in the case of harmonisation of laws.

8/200 Finally, a fundamental problem arises with respect to *coma patients;* this is resolved in a fairly uniform manner in the legal systems discussed in this investigation, however: in France[362] coma patients are awarded compensation on the basis of an objective assessment; in Hungary the claim for compensation of non-pecuniary damage is based on the unlawful impairment of a personality right[363]. In a similar fashion coma patients in the USA are also awarded compensation for »loss of enjoyment of life«[364]. This corresponds to the results of a broader comparative law study[365] and can be justified by arguing that, in an objective fashion, only the impairment of the personality rights is assessed and the purely subjective feelings that cannot be measured are not taken as the basis.

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358 *Green/Cardi,* USA no 6/72.
359 See *F. Bydlinski,* Der Ersatz ideellen Schadens als sachliches und methodisches Problem, JBl 1965, 243.
360 Basic Questions I, no 5/10 ff.
361 *Menyhárd,* Hungary no 4/77.
362 *Moréteau,* France no 1/98.
363 *Menyhárd,* Hungary nos 4/39 and 72 ff.
364 *Green/Cardi,* USA no 6/73.
365 *W.V.H. Rogers,* Comparative Report, in: W.V.H. Rogers (ed), Damages for Non-Pecuniary Loss in a Comparative Perspective (2001) 257 with references to the relevant country reports.

A similar problem arises in the case of *legal entities,* which of course are not **8/201**
capable of feeling emotions. This is why an increasing number of obstacles are appearing in England as regards compensation awards for legal entities when their personality rights are infringed[366]. By contrast, the trend is moving in the other direction in France: the tendency not to award legal entities damages for non-pecuniary damage is increasingly abandoned[367], though there is still no desire to acknowledge their personality rights. *Moréteau*[368] not only vehemently argues against granting legal entities personality rights, he also opposes awarding them compensation for non-pecuniary damage, invoking the argument that legal entities cannot have any feelings. In Hungary, on the other hand, legal entities are granted compensation when their personality rights are infringed[369]. In Poland[370] one school of thought argues that legal entities cannot feel any emotional pain and accordingly wishes to deny them compensation for non-pecuniary damage; the opposing school of thought, which is also followed by the Supreme Court, does believe in granting them compensation for the impairment of personality rights. The objective evaluation of personality right infringements in respect of legal entities too is thus likely to meet with a favourable response at present in the majority of the legal systems; however, this cannot be said with any certainty of France for instance. Perhaps consensus could be facilitated if, bearing in mind the difference between people and legal entities, great reticence was exercised when granting personality rights and accordingly legal entities were only granted personality rights insofar as such also lies in the interests of society – as the protection of human dignity cannot be at stake. This could lead for instance to the protection of their name, as the identification of entities is also important to the public, and freedom of expression since this is of great significance to society because the media are generally run by legal entities[371]. Insofar as personality rights are recognised, it seems necessary, however, to provide protection under the law of damages for subjective rights.

Besides this, there is another problem, which involves not only non-pecuniary **8/202**
but also pecuniary damage, namely whether parents should be entitled to claim compensation in the case of the *unwanted birth* of a child (wrongful conception and wrongful birth)[372]. In the above cases only compensation for the pecuniary

366 *Oliphant,* England and the Commonwealth no 5/82. See also *Oster,* The Criticism of Trading Corporations and their Right to Sue for Defamation, JETL 2011, 255.
367 *Moréteau,* France nos 1/66 and 104.
368 *Moréteau,* France no 1/103.
369 *Menyhárd,* Hungary no 4/81.
370 *Ludwichowska-Redo,* Poland no 3/66.
371 Thus, it is astonishing from this point of view that *Moréteau,* France no 1/103 rejects precisely such a personality right.
372 See Basic Questions I, no 5/39 ff.

and non-pecuniary damage as a result of pregnancy and birth as well as compensation for the impairment of the right to self-determination in this respect is granted in England but the costs of child maintenance are not covered[373]. In Norway, parents are not compensated for maintenance costs, nor do they receive any payment for the impairment of their right to self-determination[374]. In France[375] it seems that there is no question of compensating the non-pecuniary damage sustained due to the impairment of the right to self-determination and other damage is only compensated by way of exception, for example in case of rape, incest, the birth of a child with a disability and perhaps in cases where the victim is in serious financial difficulties. The claims are somewhat more extensive in Polish law[376]: besides the damage that arises due to pregnancy and birth, the increased maintenance costs for a child with a disability but also the normal maintenance costs for a child without a disability can be compensated if the mother is not able to cover the needs of the child. Furthermore, the non-pecuniary damage arising as a result of frustration of family planning is recoverable. Hungary goes even further, since full cover for the pecuniary and non-pecuniary damage is awarded where a child with a disability is born[377]. This diversity of viewpoints also reflects an even broader comparative overview[378]. It is almost impossible to speculate on which compromise could be feasible here. As the national debates correspond to international discussion, sufficient openness to agreeing a solution should be available everywhere. In any case, the arguments relevant for a decision have been sufficiently prepared[379].

8/203 It has been noted that a mediatory solution was proposed for the German speaking legal systems[380]: the harm consisting in the generation of the child maintenance claim is not deemed to be recoverable, the argument being above all that the injuring party did not only cause the maintenance duties but also a comprehensive family relationship has arisen, which consists of pecuniary but also non-pecuniary duties and rights. As the pecuniary and non-pecuniary components are inseparably interwoven, so the argument goes, the focus cannot be solely on one duty but must take account of the overall relationships, which, however, may not be seen in principle as harm; instead the premise ought to be that the pecuniary

373 *Oliphant,* England and the Commonwealth no 5/86 ff.
374 *Askeland,* Norway no 2/44 ff.
375 *Moréteau,* France no 1/108 f.
376 *Ludwichowska-Redo,* Poland no 3/75 f.
377 *Menyhárd,* Hungary no 4/84.
378 On this, see the statements in Basic Questions I, no 5/39, as well as section 21 in Winiger/Koziol/Koch/Zimmermann (eds), Digest of European Tort Law II: Essential Cases on Damage (2011).
379 This also applies to any solution outside of the law of damages; on this see *van Boom/Pinna,* Shifts from Liability to Solidarity: The Example of Compensation of Birth Defects, in: van Boom/Faure (eds), Shifts in Compensation Between Private and Public Systems (2007) 143 ff.
380 See Basic Questions I, no 5/41 ff.

harm (in particular due to maintenance duties) is usually balanced by the non-pecuniary advantages (joy of having the child)[381]. This is, however, no longer the case when the parents' maintenance duties impose an extraordinary burden on them; in such cases the costs exceeding the ordinary burden must be compensated. This would seem to be largely in line with the Polish standpoint.

II. Causation

A. Comparative review

8/204 It is generally acknowledged that liability only comes into question when there is a link between the conduct that may trigger liability and the damage sustained[382]. This prerequisite is examined on the basis of the conditio sine qua non formula (or the but-for test)[383]. This is ultimately true, despite all the uncertainties, for France too[384], as it is stressed that: »French courts will exclude liability every time it can be proved that without the alleged fact, the damage would nonetheless have occurred«.

8/205 What still remains to be overcome is the insufficient terminological and also conceptual distinction between the criterion of causation and the restrictions on imputation. Causation only marks the extreme limits of imputability, whereas restrictions on imputation are based on value judgements, for example with the aid of the adequacy criterion or the protective purpose of the rule, which are often referred to under the heading »legal causation«[385]. At this point the discussion will

381 In sum this means non-pecuniary advantages are set off against pecuniary harm. The admissibility of balancing advantages against disadvantages in this manner is controversial. It was, however, recently legitimised in an extensive, thorough and far-reaching investigation by: *Erm,* Vorteilsanrechnung beim Schmerzensgeld – ein Beitrag zur Fortentwicklung des Schadens(ersatz)rechts (2013) 313 ff, in particular 385 ff. Some American courts support such a balancing of advantages against disadvantages, see *Green/Cardi,* USA no 6/81.

382 *Zimmermann,* Comparative Report, in: Winiger/Koziol/B.A. Koch/Zimmermann (eds), Digest of European Tort Law I: Essential Cases on Natural Causation (2007) 1/29; *F. Bydlinski,* Causation as a Legal Phenomenon, in: Tichý (ed), Causation in Law (2007) 7.

383 *Askeland,* Norway no 2/58; *Ludwichowska-Redo,* Poland no 3/77; *Oliphant,* England and the Commonwealth no 5/96 f (see also the theory of the »necessary element« in the same reference); *Green/Cardi,* USA no 6/86 ff; *Yamamoto,* Japan no 7/301; as well as the country reports in *Winiger/Koziol/Koch/Zimmermann* (eds), Digest I: Natural Causation section 1. See further art 3:101 PETL; also art VI.–4:101 DCFR is clearly based on this since it requires the damage to be »a consequence«.

384 *Moréteau,* France no 1/118.

385 See *Askeland,* Norway no 2/58; *Menyhárd,* Hungary no 4/89; *Oliphant,* England and the Commonwealth no 5/95; *Green/Cardi,* USA no 6/87 f; see further *van Dam,* European Tort Law² (2013) 307 ff; *Hamer,* »Factual causation« and »scope of liability«: What's the difference? Modern Law

concern only that causation which is also called »natural« or »factual« causation, although it also involves legal aspects[386], which shows above all how omissions are qualified as causes[387]. While the distinction between natural and legal causation is discussed in France too[388], with the »equivalency of conditions« *(équivalence des conditions)* being based on the »proximity« *(proximité des causes)* or on the »adequacy« of causation *(causalité adequate),* ultimately, however, no clear distinction is drawn. This is the case even with respect to causation in all possible forms, on the one hand, and fault and/or wrongfulness, on the other, meaning that the logical reasoning behind decisions remains largely obscured. Neither can this negative aspect be resolved by the »common law inspired pragmatic approach« so highly lauded in the French report[389]: a pragmatic approach can only be persuasive when the results are in line with certain principles of justice, above all of equal treatment and *»Sachgerechtigkeit«* (the need to have appropriate regard to all involved interests). In order to establish whether these principles are really complied with, it would be necessary to understand the grounds for the decision and weigh up the interests of the parties involved. None of this is really possible, however, when a number of highly diverse criteria for imputation are mixed together with no distinction being made between them and no guidance as to how the factors weighed up were evaluated is provided. Thus, this kind of – unreflected dogmatic considerations – approach ought not to be taken as a model for harmonisation of law.

8/206 That joint and several liability and not partial liability applies when several persons independently of each other are responsible for a conditio sine qua non in respect of the same damage and, thus, the entire damage is imputable to each of them, is a widespread view in the legal systems[390], although this solution is by no means to be taken for granted[391]: if debt owed can be divided, ie in particular when it is monetary debt, liability for specific shares in the damage would be an

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Review 77 (2014) 155; *Koziol,* Natural and Legal Causation, in: Tichý (ed), Causation in Law 53; *Spier/Haazen,* Comparative Conclusion on Causation, in: Spier (ed), Unification of Tort Law: Causation (2000) 127 ff.

386 *Menyhárd,* Hungary no 4/87; diverging somewhat *Green/Cardi,* USA no 6/87 f.

387 On this, for example, *Ludwichowska-Redo,* Poland no 3/79; *Menyhárd,* Hungary no 4/93; *Oliphant,* England and the Commonwealth no 5/99; *Green/Cardi,* USA no 6/89; *Yamamoto,* Japan no 7/310 ff.

388 *Moréteau,* France no 1/112 ff.

389 *Moréteau,* France nos 1/112 and 116 ff.

390 See *Moréteau,* France nos 1/119 f and 124; *Ludwichowska-Redo,* Poland no 3/80; on the uncertainties in Hungarian law *Menyhárd,* Hungary no 4/94. See further arts 9:101 para 1 lit b PETL, VI.–6:105 DCFR; *Brüggemeier,* Haftungsrecht: Struktur, Prinzipien, Schutzbereich (2006) 187 (he even writes of a »necessary consequence«). On this problem area also *Koziol,* Österreichisches Haftpflichtrecht I³ (1997) no 14/11; *Winiger,* Multiple Tortfeasors, in: Tichý (ed), Causation in Law 79.

391 *W.V.H. Rogers,* Comparative Report on Multiple Tortfeasors, in: W.V.H. Rogers (ed), Unification of Tort Law: Multiple Tortfeasors (2004) 274 ff; *W.V.H. Rogers,* Multiple Tortfeasors, in: European Group on Tort Law (ed), Principles of European Tort Law: Text and Commentary (2005) 143 f; *Koziol,* Haftpflichtrecht I³ no 14/11 with additional references.

option – thus, eg, in general § 889 of the Austrian Civil Code (ABGB). Nonetheless, if each injuring party is responsible for the entire damage, there is an argument in favour of joint and several liability as such liability cannot result in a disproportionate extra burden for any one of them but simply means that the tortfeasors do not enjoy the advantage of partial liability. This seems reasonable as, on the one hand, it is more appropriate that the risk of one injuring party being insolvent is borne by the other injuring parties rather than the innocent victim, and on the other hand, enforcing the claim in the case of partial liability presents the victim with considerable difficulties, also due to the usually unknown extent of the internal shares in the case of such liability.

8/207 The real problems, and therefore disagreements, appear in all legal systems in the context of multiple perpetrators acting in concert as well as cumulative, alternative and superseding causation[392].

8/208 When there are a number of *perpetrators acting in concert*[393] the problem is often the near impossibility of proving the causation of each individual's contribution since it is often possible that the others would also have carried out the act without this individual. According to the general rule, joint and several liability can only apply if the – often purely psychological – causation of each individual perpetrator can be proven. For this reason, joint perpetrators are subject to only partial liability in French law[394]. In Hungarian law, however, joint and several liability is assumed and even if one of the joint perpetrators denies that the others would have carried out the act without his involvement, this is not taken into consideration[395]. German and Austrian law also proceed basically on the premise of joint and several liability, without requiring proof of causation by each individual[396]. This is based on the notion that the joint nature of the actions allows the assumption that each of those involved – psychologically or otherwise – was causal; liability for merely potential causation is thus affirmed. Nonetheless – unlike under Hungarian law – it is open to each individual involved to prove that his contribution was not a conditio sine qua non for the occurrence of the damage. In Polish law, this problematic issue has not given rise to any special rule so that, even in the case of joint actions, causation would have to be proven[397]; the report does not indicate whether this is how it really works in practice.

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392 See the country reports in *Winiger/Koziol/Koch/Zimmermann* (eds), Digest I: Natural Causation sections 5 to 8.

393 See the country reports and the comparative report in *Rogers* (ed), Unification: Multiple Tortfeasors; further the comparative report by *Winiger* in: Winiger/Koziol/Koch/Zimmermann (eds), Digest I: Natural Causation 5/29.

394 *Moréteau,* France no 1/129.

395 Cf *Menyhárd,* Hungary no 4/94.

396 Basic Questions I, no 5/73 f.

397 See *Ludwichowska-Redo,* Poland no 3/80.

8/209 *Cumulative causation* is when two real events take effect simultaneously and each of the events on their own would have been sufficient to bring about the damage[398]. Neither under the conditio sine qua non formula nor according to the but-for test does either event constitute a necessary condition as in each case the other event would have brought about the damage on its own anyway[399]. Despite the lack of natural causation, it is generally assumed that both perpetrators are liable, and usually this is assumed to mean joint and several liability[400]; according to English law, however, there is apparently partial liability[401]. Nonetheless, if one of the events is a chance event which thus falls within the victim's sphere of risk, the liability of the culpable perpetrator is entirely rejected in the USA[402]. This is hard to justify as even in the case of contributory fault of the victim, the generally accepted rule is that the damage be apportioned and that the perpetrator is not completely released from liability. It would seem appropriate to take this idea into consideration here too.

8/210 In cases of superseding *causation,* the two events that may give rise to liability come into effect one after the other[403]. Although it is possible to see this as stretched out chronologically cumulative causation, the solutions provided for are nonetheless very diverse: in Norway[404] there is discussion of the hypothetical case where A fatally injures a horse in a traffic accident and before it dies B shoots it. In logical extension of the solution for cumulative causation, it is assumed that A and B are jointly and severally liable. However, if the horse was in fact already dead when B shot it, A alone would be liable. This may seem surprising in that here too A would not be the cause of the death of the horse since it would have been shot by B and in this respect the situation is the same as in case of cumulative causation. The difference, however, is that, after the horse had died, the shooting could no longer endanger its life and thus, there would be no wrongfulness in this respect, meaning that there could be no question of B being liable[405]. On the other hand, it seems worthy of note that in the first variation, while B shoots the dead horse and

398 Basic Questions I, no 5/111.

399 This is emphasised, for example, by *Yamamoto,* Japan no 7/332 ff. In England, on the other hand, the problem is glossed over *(Oliphant,* England and the Commonwealth no 5/100 f) by the phrase that both events are a »material contribution«.

400 *Askeland,* Norway no 2/54 ff; *Ludwichowska-Redo,* Poland no 3/90; *Green/Cardi,* USA no 6/107.

401 *Oliphant,* England and the Commonwealth no 5/101.

402 *Green/Cardi,* USA no 6/108.

403 See the comparative report by *B.A. Koch* in: Winiger/Koziol/Koch/Zimmermann (eds), Digest I: Natural Causation 8a/29.

404 *Askeland,* Norway no 2/67.

405 *Green/Cardi,* USA no 6/111 object to this argument, however: »US law, on the other hand, holds a broader conception of the duty owed – at least with regard to causing personal injury or property damage. Thus, there is a default duty to act with reasonable care when one's conduct creates a risk to others. Duty would not, in this regime, be as narrowly circumscribed with regard to specific property.«

thus certainly acts wrongfully, the horse only has a very low value due to its fatal injuries; this could be seen as an argument against joint and several liability and thus a reason to treat the perpetrators equally. In Poland[406], unlike in Norway but in line with the prevailing view in Austria, it is assumed that the second event is to be disregarded and the first perpetrator should remain solely and entirely liable. Besides this, however, other diverging viewpoints are defended; in particular the Polish Supreme Court tends to take the second event into account[407]. According to *Oliphant*[408], the liability of the first perpetrator is not affected in England either by the fact that a second perpetrator would have brought about the same damage; the second perpetrator will not be held liable. If the second event falls within the victim's sphere of risk, on the other hand – in a very remarkable contradiction of the value judgements underlying the solution in the case of two responsible perpetrators – the first perpetrator is freed from liability so that the victim must bear the entire damage alone; this is in harmony with liability in the case of cumulative causation. This corresponds too with the solution in the USA[409] but *Green/Cardi* express their understanding of why joint and several liability might be assumed[410] when there are two responsible perpetrators while nonetheless proposing the interesting departure that the second perpetrator's liability only arises with regard to the victim if the first perpetrator is insolvent[411].

8/211 The most important category in practice is presented by the cases of *alternative causation:* the victim has suffered damage which has definitely been caused either by event 1, which was caused wrongfully and culpably, or by event 2, that in the first variation was also brought about wrongfully and culpably but in the second variation is a result of chance; it is not possible, however, to determine which

406 *Ludwichowska-Redo,* Poland no 3/91.
407 *Ludwichowska-Redo,* Poland no 3/93 ff.
408 *Oliphant,* England and the Commonwealth no 5/102 ff.
409 *Green/Cardi,* USA no 6/108 ff.
410 Basic Questions I, no 5/123.
411 The following addition would be proper: »or if his liability is not enforceable for other reasons.« The question is whether the solution proposed could really lead to a reduction in numbers of proceedings, as often the insolvency of the primary, definitely liable perpetrator only comes to light during the proceeding and then a second proceeding against the only contingently liable party becomes necessary; in the case of joint and several liability, on the other hand, both perpetrators could be sued in one proceeding.

of the two events was the cause[412]. According to English[413] and Norwegian[414] law – as in Switzerland[415] – neither of the two potential perpetrators is liable. However – even in common law – diverging opinions are put forward; *Askeland* nevertheless considers that proportional liability is not reconcilable with the applicable Norwegian law. In France[416] it seems that joint and several liability will be applied if the perpetrators acted as a group. Poland[417], Hungary[418] and Japan[419], on the other hand, go beyond this so that the joint and several liability of the potential perpetrators is assumed; however, if one of the two events is a result of chance, the victim will have no entitlement to compensation. Partial liability is rejected in any case. In the USA, the liability of two alternative perpetrators seems to run into the difficulty that no balance of probability can be determined and moreover the theory of »risk contribution« which points to partial liability is not overly popular[420]; partial liability would often seem to be achieved, however, via the loss of chance theory[421]. This theory is used regularly in its land of origin, France[422], but not applied in England and Poland[423]; in Hungary it is applied in relation to doctors' liability[424].

412 See the comparative report by *Koziol* in: Winiger/Koziol/Koch/Zimmermann (eds), Digest I: Natural Causation 6a/29 and 6b/29 on this; further see the recently published book by *Gilead/Green/B.A. Koch* (eds) on Proportional Liability: Analytical and Comparative Perspectives (2013), with a breakdown into numerous sub-groups and aspects of different solutions in *Gilead/Green/Koch,* General Report: Causal Uncertainty and Proportional Liability: Analytical and Comparative Report 1 ff, as well as numerous country reports. On liability in the medical field see *B.A. Koch,* Medical Liability in Europe: Comparative Analysis, in: B.A. Koch (ed), Medical Liability in Europe: A Comparison of Selected Jurisdictions (2011) 634 ff with references to the country reports.

413 *Oliphant,* England and the Commonwealth no 5/106 ff; further *Oliphant,* Causal Uncertainty and Proportional Liability in England and Wales, in: Gilead/Green/Koch (eds), Proportional Liability 123.

414 *Askeland,* Norway no 2/59; further *Askeland,* Causal Uncertainty and Proportional Liability in Norway, in: Gilead/Green/Koch (eds), Proportional Liability 249 ff.

415 Basic Questions I, no 5/83; further *P. Widmer/Winiger,* Causal Uncertainty and Proportional Liability in Switzerland, in: Gilead/Green/Koch (eds), Proportional Liability 323 ff.

416 *Moréteau,* France no 1/124.

417 *Ludwichowska-Redo,* Poland no 3/81 ff; cf further *Bagińska,* Causal Uncertainty and Proportional Liability in Poland, in: Gilead/Green/Koch (eds), Proportional Liability 253 ff.

418 *Menyhárd,* Hungary nos 4/88 and 94.

419 *Yamamoto,* Japan no 7/351.

420 *Green/Cardi,* USA no 6/92 ff; in more detail see *Green,* Causal Uncertainty and Proportional Liability in the US, in: Gilead/Green/Koch (eds), Proportional Liability 343 ff.

421 *Green/Cardi,* USA no 6/96 ff; further *Green* in: Gilead/Green/Koch (eds), Proportional Liability 362 ff.

422 *Moréteau,* France no 1/131 ff.

423 *Oliphant,* England and the Commonwealth nos 5/107 and 113; *Ludwichowska-Redo,* Poland no 3/86 f.

424 *Menyhárd,* Hungary no 4/100.

8/212 While the DCFR chose the more conservative solution of joint and several liability of alternative perpetrators (art VI.–4:103), the EGTL proposes a more modern rule in art 3:103 para 1 PETL: »In case of multiple activities, where each of them alone would have been sufficient to cause the damage, but it remains uncertain which one in fact caused it, each activity is regarded as a cause to the extent corresponding to the likelihood that it may have caused the victim's damage.« Further, PETL proposes a rule for the even more difficult case that an event giving rise to liability and a chance event are the alternative causes. In logical extension of art 3:103 para 1, it also provides for partial liability here so that the potential injuring party must bear part of the damage.

8/213 As far as market share liability is concerned, this would seem to be accepted in France[425] but not in Poland or Hungary[426]. In the USA[427], market share liability is limited to products with generic risks; therefore it was not applied analogously to asbestos products, for example, as the different products give rise to different risks.

B. Conclusions

8/214 There is controversy above all in relation to the approaches taken in cases of uncertain causation, in particular in the case of alternative causation with one possible cause being an event that would trigger liability and the other a chance event. The doctrine that relies on the loss of a chance is not, in my opinion, persuasive either dogmatically or – as not all similar cases can be solved alike – from the point of view of the result[428]. It is understandable that there are serious concerns as regards the approach based on potential causation which leads to partial liability for alternative perpetrators and to apportionment between the potential perpetrator and the victim when an event that would trigger liability competes with a chance event, as it departs from the prerequisite of proven causation. Moreover, it plays a role that in the common law it is the predominance of probabilities rather than the conviction of the judge or the high probability[429] that is decisive with respect to the basis for liability[430]. It does not seem very satisfactory, however, to leave the victim alone with the entire burden of the risk when it is not possible to determine which of two parties who have acted wrongfully and culpably have caused the damage, or when the chance event which falls in the victim's sphere of the risk

425 *Moréteau,* France no 1/125.
426 *Ludwichowska-Redo,* Poland no 3/89; *Menyhárd,* Hungary no 4/102.
427 *Green* in: Gilead/Green/Koch (eds), Proportional Liability 357.
428 See Basic Questions I, no 5/93 ff.
429 Thus, for example in Japan, see *Yamamoto,* Japan no 7/341 ff.
430 *Oliphant,* England and the Commonwealth no 5/111.

may have caused the damage with roughly equal probability as a wrongful, culpable action. On the one hand, this would produce rigid, all-or-nothing solutions and, on the other hand, it seems unreasonable that, in the case of roughly equal probability, the party who acted wrongfully and culpably and who brought about the lack of clarity as to causation is freed completely from liability while the innocent victim must carry all of the risk[431].

8/215 On the basis of these considerations, partial liability would certainly be functionally more desirable and could also be justified by theoretical arguments despite the weighty counter-arguments as the solution by no means conflicts with existing principles and there are certainly theoretical starting points for the partial solution: on the one hand, apportionment of damage is generally accepted when imputation criteria fall into both the injuring party's and the victim's sphere, namely the contributory responsibility of the victim. In terms of the underlying value judgements, the cases under discussion here are similar: the conduct that – apart from the proven causation – triggers liability of the potential injuring party is countered by an event that falls within the victim's sphere of risk. At least in the case of roughly equal probability, there is no justification for favouring the culpable perpetrator with complete freedom from liability.

8/216 On the other hand, it must be borne in mind that all legal systems depart from the conditio sine qua non formula and the but-for test when establishing liability in cases of cumulative causation; in that case, merely potential causation is deemed to be sufficient. In cases of joint perpetrators too, there is a tendency to allow merely possible causation to be enough for liability to arise.

8/217 Hence, it should be possible to develop the same ideas using the approach of partial liability in order to find consensus on a solution for cases of alternative causation[432].

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431 See on this also *Gilead/Green/Koch,* General Report, in: Gilead/Green/Koch (eds), Proportional Liability 1 ff. They look for the solution on the basis of the aims of the law of damages and argue as follows (7 f): »The major goal of tort law is to foster justice and fairness. Subject to considerations of justice and fairness in the allocation of risks and harms, the increase of the aggregate wellbeing in society (efficiency) is also a worthy secondary goal of tort law. This goal attempts to increase overall well-being by inducing potential actors to avoid harms that can be prevented at lower cost than the harm (deterrence) and by minimizing the costs of determining who should bear the cost of those accidents that do occur (administrative efficiency). Given that, the question is which rules best promote the goals of tort law.« With these very general and undefined statements of the aims of tort law, however, it will hardly be possible to arrive at concrete results.

432 See Basic Questions I, no 5/75 ff.

Part 6 The elements of liability

I. Preliminary remarks

8/218 At first glance, there may be an impression that there is far-reaching consensus on the grounds for imputing damage caused: *fault* has been recognised for centuries as an element of liability; liability for the misconduct of *auxiliaries* is also to be found in all legal systems; and a strict liability independent of fault, in particular for especially *dangerous things* or activities, is on the advance – except in common law jurisdictions. When we look more closely, however, there are considerable differences even in the understanding of fault, which also presented the European Group on Tort Law with significant difficulties[433]. *Wrongfulness* is often recognised as a separate ground of fundamental importance for imputation and is seen as a prerequisite for fault, yet in some legal systems it is not even discussed; moreover, it turns out to be an extremely ambiguous term[434]. Liability for auxiliaries is very differently structured and the underlying principles are still controversial[435]. Liability for dangerousness is recognised in many jurisdictions as ranking equally with fault-based liability, in other legal systems it is practically unknown[436]. Further grounds for imputation lead a shadowy existence and ultimately there is often no awareness even of the question of the interplay between different elements of liability, let alone comprehensive conclusions having been arrived at in the debate.

433 See *P. Widmer,* Liability Based on Fault, in: EGTL, Principles 64 ff; *P. Widmer* (ed), Unification of Tort Law: Fault (2005); *Koziol,* The Concept of Wrongfulness under the Principles of European Tort Law, in: Koziol/B.C. Steininger (eds), European Tort Law 2002 (2003) 552.

434 On this *Koziol* (ed), Unification of Tort Law: Wrongfulness (1998); see also the richly varied discussion in Japan, *Yamamoto,* Japan no 7/118 ff.

435 On this *Spier* (ed), Unification of Tort Law: Liability for Damage Caused by Others (2003).

436 See the country reports in *B.A. Koch/Koziol* (eds), Unification of Tort Law: Strict Liability (2002).

II. The misconduct

A. Comparative review

1. Wrongfulness and fault

8/219 The Norwegian report[437] demonstrates very well that the difficulties highlighted in the German legal family ultimately also exist in other legal systems too: the uniform, unspecific term of *wrongfulness* obscures the fact that very different things are meant by this term and its relationship to fault is also blurred. The self-critical declaration by *Askeland*[438] to the effect that »A crude outline of the Norwegian perception of wrongfulness may be that it mostly refers to conduct, but may also refer to the concept of damage.« is telling. This refers, however, merely to the very legitimate distinction, also discussed in the German legal family, between wrongfulness of the result *(Erfolgsunrecht)*[439] and wrongfulness of the conduct *(Verhaltensunrecht)*[440], which also gives rise to difficulties in other legal systems[441].

8/220 Both concepts of wrongfulness are ultimately justified since they deal with different aspects: on the one hand, there is the determination at a high level of abstraction that there has been a disadvantageous change not desired by the legal system because of interference with protected interests[442]; this type of wrongfulness of the result touches on the concept of damage[443] as it deals with the occurrence of legally relevant harm. This concept of wrongfulness, which in my opinion would be better described as fulfilment of the factual elements of the offence *(Tatbestandsmäßigkeit),* is also important outside of the law of damages – for example, in respect of preventive and reparative injunctions[444] as well as claims based on unjust enrichment[445], as it concerns the respective protection of interests and how

437 *Askeland,* Norway no 2/71 ff.
438 *Askeland,* Norway no 2/86.
439 This is not only advocated in Germany (Basic Questions I, no 6/4), but is apparently also predominantly advocated by academics in Hungary. However, this position cannot be found in case law *(Menyhárd,* Hungary no 4/104).
440 Basic Questions I, no 6/3.
441 See *Ludwichowska-Redo,* Poland no 3/99; *Menyhárd,* Hungary no 4/104; *Yamamoto,* Japan nos 7/148 ff and 374 ff.
442 In Japan – like in Germany apparently – wrongfulness of the result is invoked above all when it comes to absolutely protected rights of control *(»Herrschaftsrechten«),* while the duties to meet certain standards of behaviour are determined on the basis of a comprehensive weighing up of interests when it comes to the »correlative rights«; see *Yamamoto,* Japan no 7/379 ff.
443 *Oliphant,* England and the Commonwealth no 5/67, also hints in this direction in relation to the connection between damage and the duties of care as well as the extent of the liability.
444 See *Moréteau,* France no 1/165; *Ludwichowska-Redo,* Poland no 3/100.
445 Cf *Askeland,* Norway no 2/73.

far this goes. The finding that a protected interest has been infringed does not in itself reveal anything about whether this occurred as a result of concrete, blameworthy misconduct, which can be the foundation of fault-based liability.

8/221 This conclusion would require the determination that the conduct of the injuring party has infringed an objective *standard of care*[446], ie that he acted negligently, at least, and thus wrongfully insofar as his conduct is concerned[447]. In this sense, art VI.–3:102 DCFR describes »negligence« as the neglect of the »standard of care«; art 4:102 PETL refers to the »standard of conduct«.

8/222 This objective infringement of a duty of care is distinguished in almost all legal systems from *fault*[448], which – though to extremely various degrees – is related to the subjective blameworthiness of the conduct, with the personal abilities and knowledge of the injuring party being taken into account; this is shown at a minimum by consideration of age and mental illness[449]. However, in some legal systems this is obscured by the fact that there is talk of objective duties of care adapted to the age of children or to people with mental disabilities[450]; this is also the approach taken by art 4:102 para 2 PETL and art VI.–3:103 para 1 DCFR. In order to overcome reluctance to take account of subjective circumstances when determining fault, in particular due to the difficulties of proof, the Hungarian solution[451] – a reversal of the burden of proof – could provide some starting points.

8/223 The threefold division into factual elements of the offence *(Tatbestandsmäßigkeit),* breach of a duty of care and subjective blameworthiness reflects practical necessity and is ultimately significant in this respect even in legal systems that only base the decision on fault and do not openly recognise the notion of wrongfulness, for example French law[452]: naturally, it only makes sense to speak of fault

446 This is only relevant in the USA: *Green/Cardi,* USA no 6/114.

447 Cf *Moréteau,* France no 1/167. It must be pointed out that in Japanese law (see *Yamamoto,* Japan no 7/147) there is emphasis of the gradability of wrongfulnesss. In Austria too there is support for the view that wrongfulness may be accorded different weight *(Koziol,* Haftpflichtrecht I[3] no 4/18 with additional references).

448 Very clear is the new Hungarian Code: *Menyhárd,* Ungarn no 4/105; see also *Ludwichowska-Redo,* Poland no 3/118, and the discussion reported by *Yamamoto,* Japan no 7/132 ff. According to *Moréteau,* France no 1/141 ff, French law – albeit less explicitly – also distinguishes between wrongfulness and fault; *Galand-Carval,* Fault under French Law, in: Widmer (ed), Unification: Fault 92 f. See *P. Widmer,* Comparative Report on Fault as a Basis of Liability and Criterion of Imputation (Attribution), in: Widmer (ed), Unification: Fault 336 f in respect of all of the above.

449 See *Askeland,* Norway no 2/79. In France, however, children and mentally ill persons are held liable without any consideration of their capacity for fault; see *Moréteau,* France no 1/153.

450 *Oliphant,* England and the Commonwealth no 5/129 ff; *Green/Cardi,* USA no 6/114. Likewise PETL in art 4:102 para 2.

451 *Menyhárd,* Hungary nos 4/114 and 116. On the earlier dissemination of this idea in the Communist countries of Eastern Europe see *Will/Vodinelic,* Generelle Verschuldensvermutung – das unbekannte Wesen. Osteuropäische Angebote zum Gemeineuropäischen Deliktsrecht? in: Magnus/Spier (eds), European Tort Law. Liber amicorum for Helmut Koziol (2000) 302.

452 *Moréteau,* France no 1/141 ff.

as a ground for imputation when the conduct involved is not allowed under the legal system and is blameworthy[453]. Thus, wrongfulness is inevitably an inherent objective element within fault or a prerequisite for fault[454]. These two manners of speaking are not so very different in fact, but the latter variation is preferable as wrongfulness also frequently plays a role as an independent criterion for imputation, which together with other criteria – for example the financial capacity to place the burden on children or mentally ill persons – can also provide a basis for liability even where there is no subjective blameworthiness[455].

8/224 This Babylonian tower of confusion, debate at cross purposes and numerous misunderstandings could all be avoided if these three levels of misconduct, which are material when fulfilling different aims, could be clearly distinguished and referred to using different terms, so that the debate could focus on the resolution of the real issues behind the terminology. It would no doubt be best to completely avoid the ambiguous expression of wrongfulness and talk of – result-based – factual elements of the offence (impairment of a protected interest) – behaviour related – negligence (breach of an objective duty) and fault (subjective blameworthiness)[456].

2. De minimis rule

8/225 The DCFR courageously sets out the *de minimis rule* in art VI.–6:102: »Trivial damage is to be disregarded«. At this level of generality, the rule certainly does not correspond to the existing laws in Europe. However, there are at least signs of recognition of the concept in EU countries[457] due to the implementation of the Product Liability Directive, which stipulates a threshold of € 500; the same applies for Norway[458], but not for the USA[459]. In Norway[460] the de minimis rule applies in respect of personal injury as well, in particular in the case of non-pecuniary damage, but also in respect of the liability of parents for children[461]. In Hungary, on

453 See also in this sense *Ludwichowska-Redo,* Poland no 3/119. Accordingly the opposite viewpoint represented by *Oliphant* in respect of English law that fault is to be understood as an aspect of wrongfulness is surprising *(Oliphant,* England and the Commonwealth no 5/118).

454 See *Moréteau,* France no 1/143; *Ludwichowska-Redo,* Poland nos 3/97 f and 110; *Quézel-Ambrunaz,* Fault, Damage and the Equivalence Principle in French Law, JETL 2012, 31 ff; *Zmij,* Wrongfulness as a liability's prerequisite in Art. 415 Polish Civil Code, in: Heiderhoff/Zmij (eds), Tort Law in Poland, Germany and Europe (2009) 16 f. Cf also *Yamamoto,* Japan no 7/139 ff.

455 See *Ludwichowska-Redo,* Poland no 3/100; as regards the German legal family Basic Questions I, no 6/10.

456 See Basic Questions I, no 6/6 ff in respect of all of the above.

457 See *Ludwichowska-Redo,* Poland no 3/101.

458 *Askeland,* Norway no 2/76.

459 *Green/Cardi,* USA no 6/115 ff.

460 *Askeland,* Norway no 2/76.

461 *Askeland,* Norway no 2/98; *Ludwichowska-Redo,* Poland no 3/101; serious harm in the USA is also

the other hand, there are no further examples[462]. In Poland, neighbours on adjacent pieces of land must tolerate average levels of impact on the enjoyment of their land without being entitled to compensation[463]; thus, it is clearly not wrongful to cause such. In France too[464], the usual impact on others is not deemed to be wrongful and the same applies to Japan[465]. In England and the USA – as a striking exception – a de minimis threshold was set in the asbestos cases in order to make sure the inadequate amounts of funding went to the victims with serious damage[466]. The de minimis rule is either used to render minimal damage non-recoverable[467] or blocks compensation claims via preclusion of wrongfulness as regards the creation of merely minor risks[468], though it is also necessary to distinguish whether the external elements of the offence or the breach of a duty of care have been negated. If the basis taken is the minor nature of the damage sustained, in that the external scope of protection for a legal good is generally limited to this extent, not only compensation claims but also preventive injunctions in this respect are precluded[469]; in other words certain infringements must be tolerated. On the other hand, if it is only the duties of care which are limited in this respect, only the duty to compensate for minor damage is precluded but the scope of protection is not otherwise limited and threatened damage can be averted by seeking injunctive relief[470].

3. The objective duties of care

8/226 In some of the legal systems there is work on elaborating the factors that must be considered when establishing the *objective duties of care:* in Norway reference is made to the significance of the relationship between the injuring party and the victim[471], further to the foreseeability of an injury[472], how reasonable it would be to expect the injuring party to take a different course of action[473] and also the interest in freedom of movement[474]. In Japanese law, regard is had in a very similar fashion

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required in the case of »emotional harm«: *Green/Cardi,* USA no 6/116.

462 *Menyhárd,* Hungary no 4/108.

463 *Ludwichowska-Redo,* Poland no 3/101.

464 See *Moréteau,* France no 1/171.

465 *Yamamoto,* Japan no 7/476.

466 *Oliphant,* England and the Commonwealth no 5/119; *Green/Cardi,* USA no 6/117.

467 Thus, in Norway: *Askeland,* Norway nos 2/74 and 77.

468 This is pointed out by *Askeland,* Norway no 2/75 f, cf also *Green/Cardi,* USA no 6/118; *Yamamoto,* Japan no 7/476.

469 Cf *Moréteau,* France no 1/171.

470 See Basic Questions I, no 6/37.

471 *Askeland,* Norway no 2/81; *Oliphant,* England and the Commonwealth no 5/118.

472 *Oliphant,* England and the Commonwealth no 5/118.

473 *Askeland,* Norway no 2/81.

474 *Askeland,* Norway no 2/81.

to the probability of damage, the weight of the injured interest and the weight of the interests of the acting party[475]. In the USA[476], the list of relevant factors is very similar to PETL and the Austrian Draft of a new law of damages.

4. Omissions

8/227 As regards omissions[477], what is already known can be confirmed: duties to actively help others and safeguard such against damage are not recognised in England and in the USA[478]. In England, however, exceptions are made when someone has created a source of danger or taken on responsibility for the welfare of another or due to his position carries such responsibility. In Norway too there is hardly any prospect of the courts affirming liability for failure to render assistance[479]; this is a point that stands out in surprising contrast to the otherwise generous treatment of the victim when granting compensation. In Hungary, by contrast, duties to render assistance are not rejected in principle[480].

5. Pure economic loss

8/228 In France[481] and in Poland[482] – like in Austria – economic interests are not denied protection in general but the compensation available is limited in various ways, in particular in that compensation is rendered only to the »direct victim« – a rather unclear term – and under especial consideration of the adequacy element; if there was intention on the part of the injuring party, more extensive claims are recognised[483], in particular when there is interference with third-party legal relations[484]. Beyond this, pure economic loss is fully recoverable in the case of culpa in contrahendo[485]; moreover, compensation is available to surviving dependants where the primary victim is killed[486]. In Hungary, there has apparently not been any detailed discussion but it seems that the solution is worked towards from a causative

475 *Yamamoto,* Japan no 7/145; cf also no 7/580.
476 *Green/Cardi,* USA no 6/119 ff.
477 On these see also *Koziol,* Liability for Omissions – Basic Questions, JETL 2011, 127; *P. Widmer,* Ex nihilo responsabilitas fit, or the Miracles of legal Metaphysics, JETL 2011, 135; *Quill,* Affirmative Duties of Care in the Common Law, JETL 2011, 151; *Faure,* Liability for Omissions in Tort Law: Economic Analysis, JETL 2011, 184; further *van Dam,* European Tort Law² (2013) 246 ff.
478 *Oliphant,* England and the Commonwealth no 5/120 f; *Green/Cardi,* USA no 6/123 f.
479 *Askeland,* Norway no 2/77.
480 *Menyhárd,* Hungary no 4/109.
481 See *Moréteau,* France no 1/174.
482 *Ludwichowska-Redo,* Poland no 3/102 ff.
483 *Ludwichowska-Redo,* Poland no 3/107.
484 *Ludwichowska-Redo,* Poland nos 3/105 and 107.
485 *Ludwichowska-Redo,* Poland no 3/104.
486 *Ludwichowska-Redo,* Poland no 3/106.

approach; the latter is thus a prerequisite[487]. In England, there is great reticence towards the compensation of pure economic loss but some groups of cases have emerged in which compensation is granted[488].

6. Objective and subjective assessment of fault

8/229 The prevailing tendency nowadays is largely in favour of an *objective assessment of fault*[489]*:* thus, in *France* even the mentally ill are rendered liable without consideration of their accountability for their actions on the basis of objective assessment of fault[490]. Beyond this, there is a presumption of fault when the wrongfulness of conduct has been proven[491].

8/230 In *Poland*[492]*,* the »normative« concept of fault includes a clear objectivisation that leads to difficulties distinguishing it from wrongfulness. The capacity for fault only begins when a child is 13 years old and only in case of soundness of mental health. Predominantly, however, individual aspects that are easy to identify or long-term will be taken into account, eg age, discernible physical or mental disabilities and illnesses[493].

8/231 In *Hungary*[494] the objectivisation is likewise extensive; the knowledge, skills and abilities of the injuring party are not to be taken into account. Moreover, the standard for contractual breaches is considerably stricter than under the law of delict.

8/232 Similarly, in *England* »negligence« and thus »fault« are objective standards; *Oliphant* quotes the classical description[495]: »Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.« Skills, knowledge and abilities do not enter into the equation. Exceptions are made, however, for small children, as they do not yet have the capacity to act deliberately; in respect of older children, the question is whether they fulfil the standard that is to be required of a normally

487 *Menyhárd,* Hungary no 4/112.
488 *Oliphant,* England and the Commonwealth no 5/122 ff.
489 See also *van Dam,* Tort Law[2] 263 ff, 269 ff on this; *Widmer,* Comparative Report on Fault as a Basis of Liability and Criterion of Imputation (Attribution), in: Widmer (ed), Unification: Fault 347 ff with references to the country reports.
490 *Moréteau,* France no 1/152 f.
491 *Moréteau,* France nos 1/155 and 168.
492 *Ludwichowska-Redo,* Poland nos 3/109, 112 and 119; *Habdas,* Tortious liability in Polish law for damage caused by minors, in: Heiderhoff/Zmij (eds), Tort Law in Poland, Germany and Europe (2009) 109 ff.
493 On this see *Ludwichowska-Redo,* Poland no 3/118; cf also *Habdas* in: Heiderhoff/Zmij (eds), Tort Law in Poland, Germany and Europe 116 ff.
494 *Menyhárd,* Hungary no 4/116.
495 *Oliphant,* England and the Commonwealth no 5/127.

sensible child their age. In the case of children who engage in activities that are reserved for adults, however, the standard applicable to adults will be applied.

8/233 In the *USA*[496] too, an objective standard is used, with reference to the difficulties involved in establishing subjective abilities and to the fact that it does not make any difference to the victim whether the injuring party has the necessary abilities or not. However, this is a very one-sided view; this would also mean any chance event could lead to compensation claims and any exceptions for children or mentally ill people would be inadmissible. However, in fact the objective duty of care is reduced for children and usually children under five or seven years old are freed from liability in any case; in the next age range – between seven and 14 years of age – there is the rebuttable presumption that the child is not capable of being negligent and for those over 14 years of age the rule is a rebuttable presumption that they are capable of negligence[497]. Flexible rules also apply to physically disabled people in that the duties of care are adapted to their abilities. However, there is no consideration of cognitive disabilities[498] and thus, those who have been equipped by nature with below average abilities but are not labelled »mentally disabled« are also burdened with the risk for behaviour they cannot avoid so that their daily lives are inescapably encumbered with duties to compensate. In stark contrast to this, above average abilities are taken into account and lead to a stricter standard for the duty of care[499].

8/234 *Japanese* law also applies an objective standard of fault and only takes account of the individual's subjective powers of discernment, which may influence his behaviour, in the case of children and mentally ill people[500]. Nonetheless, the objectivisation is relativised by the fact that the yardstick for the injuring party is the average person in the group to which he belongs[501]. This group classification results in an interim position between objective and subjective fault.

8/235 The diversity of rules on the *liability of children* for their own conduct is astonishing: sometimes accountability is tied to specific age bands but sometimes it is not; insofar as age bands are stipulated, these have varying significance as they can either represent rigid boundaries or merely trigger rebuttable presumptions: usually children are liable alongside their parents but their liability can also be merely subsidiary; it can also be subject simply to the general rules or only appear as liability on grounds of equity, which will then depend above all on the financial circumstances of both injuring party and victim. Some legal systems provide for children to be liable subject to equity considerations but this is by no means true

496 *Green/Cardi,* USA no 6/128.
497 *Green/Cardi,* USA no 6/127.
498 *Green/Cardi,* USA no 6/131.
499 *Green/Cardi,* USA no 6/132 ff.
500 *Yamamoto,* Japan nos 7/86 and 139 ff.
501 *Yamamoto,* Japan no 7/603 ff.

of most jurisdictions[502]. It is the case almost everywhere, nonetheless, that either the lack of or reduced powers of discernment are taken into account when assessing fault or the objective duties of care are reduced accordingly.

8/236 The situation in France[503], on the other hand, is completely different as unlike in other legal systems the liability of children is not less stringent but more stringent: after mentally ill persons were declared to be liable by law in 1968, the courts followed this example further in 1984 and decided that children would be fully liable regardless of their powers of discernment. The prerequisite for liability is still, however, an objective breach of a duty of care, although it is possible to find formulations that even seek to depart from this and make liability strict. It is stressed that the liability of children is usually covered by their parents' household insurance policies[504].

B. Conclusions

1. Levels of misconduct

8/237 The country reports once again clearly display the present-day terminological uncertainty and the lack of clarity about the different functions of the categorisation into various *levels of misconduct.* The general passive resistance towards any clear elaboration of the different functions and the clear terminological classification of the different types of misconduct is astounding in face of the constant misunderstandings. In particular for the purposes of any international discussion, it is thus urgently necessary to achieve clarity in order to make effective communication possible. In fact, no real obstacles should present themselves since in truth different types of misconduct are known and needed in almost all legal systems. Therefore, a distinction should be drawn between very abstract interference with protected interests (the factual elements of the offence), the infringement of objective duties to behave in a certain way (breach of a duty of care) and the fault which – to a certain extent – must be assessed subjectively.

502 See *Martín-Casals,* Comparative Report, in: Martín-Casals (eg), Children in Tort Law I: Children as Tortfeasors (2006) 425 ff, in respect of all of the above. In Japanese law there is no liability on grounds of equity for children or mentally ill persons.

503 *Moréteau,* France no 1/152 f; *Francoz-Terminal/Lafay/Moréteau/Pellerin-Rugliano,* Children as Tortfeasors under French Law, in: Martín-Casals (eg), Children in Tort Law I 170 ff.

504 *Moréteau,* France no 1/153; *Francoz-Terminal/Lafay/Moréteau/Pellerin-Rugliano* in: Martín-Casals (ed), Children in Tort Law I 185.

2. The subjective standard of fault

8/238 As far as the return to *subjectivisation of fault* as a basically necessary element of imputation within the context of founding liability for misconduct is concerned, this must be strongly promoted on the basis of very fundamental considerations[505]: in any case, insofar as human dignity requires society to enable such persons to take part in general, social life, it would contravene human rights if any individual were ultimately held liable for being born with below average abilities. It does not make sense to recognise an individual as a member of society but at the same time to subject him to strict liability due to his mental or physical difficulties, so that he has no way to avoid this liability when taking part in everyday life and he is regularly subject to an especially heavy burden simply due to the way he is. It would not be in harmony with fundamental rights if people's inherent deficits were recognised as a ground for liability, ultimately forcing such people to choose between inescapable liability for participating in everyday life which is necessary to the dignity of human existence or to depart from life. It must also be noted that there can be no objective justification if most legal systems, while taking account of the individual traits of children and the mentally ill, nonetheless impose liability when it comes to somewhat less striking cognitive imperfection or physical frailty. Nor can this be convincingly countered by creating categories of people, eg blind people: apart from the fact that groups with different standards of care cannot be created for all types of cognitive or physical disabilities, this would also lead to objectivisation within the respective groups.

8/239 However, on the other hand, the *limits* to consideration of cognitive or physical disability must once again be highlighted: as far as the activities for which someone does not have the necessary abilities are avoidable, he must, as far as is reasonable, desist from such activities; if he does not do so, he is accountable for failing to comply with the objective duties of care. The arguments presented against taking subjective abilities into consideration, essentially that there would be serious difficulties in proving such, are not persuasive as these problems can be solved by the implementation of further rules on the burden of proof of fault: it seems logical that if someone has reached the relevant age for being capable of fault yet he is not so capable, he must prove that this is the case. In addition, he must show that due to his lack of the required abilities, he is not subjectively

505 For more detail on this see Basic Questions I, no 6/81 ff; further *Koziol,* Objektivierung des Fahrlässigkeitsmaßstabes im Schadenersatzrecht? AcP 196 (1996) 593 ff; *Koziol,* Liability based on Fault: Subjective or Objective Yardstick? Maastricht Journal of European and Comparative Law 1998, 111 ff; *P. Widmer,* Reform und Vereinheitlichung des Haftpflichtrechts auf schweizerischer und europäischer Ebene, in: Zimmermann (ed), Grundstrukturen des Europäischen Deliktsrechts (2003) 175 f. Cf on this problem area also *Graziadei,* What went wrong? Tort law, personal responsibility, expectations of proper care and compensation, in: Koziol/B.C. Steininger (eds), European Tort Law 2008 (2009) 2 ff.

blameworthy; this kind of reversal of the burden of proof is familiar to many – above all central and eastern European – legal systems[506]. The consideration of subjective abilities can furthermore be qualified as in many legal systems in respect of children: if the conduct was objectively in breach of duties of care, but the injuring party is subjectively not blameworthy due to lack of abilities, it is nonetheless possible to find *full or partial liability* in consideration in particular of advantages gained by the injuring party by the breach of duty of care as well as the financial circumstances of both parties. Moreover, social security largely covers damage in the area of bodily injuries.

The return to subjectivisation of fault should also be facilitated having regard to the increasing prevalence of no-fault based, ie strict, liability, which appropriately provides for compensation of damage independently of subjective elements. **8/240**

3. The special problems concerning liability of children and persons not accountable for their actions

A closer look at the liability of *children* for their damaging conduct will be taken here: the options range from complete lack of liability, subsidiary liability of parents, personal liability for proven fault without considering the liability of the parents, liability on grounds of equity (even absent subjective fault but in the light of the financial circumstances of both the child and the victim) and rather strict liability despite lack of powers of discernment. When looking at the national solutions in a comparative law study, it must be borne in mind that the legal context must always be considered at the same time[507]. **8/241**

Let us begin with the extreme *French* approach: the concerns about the strict liability of children might be assuaged by the information that this has little practical significance as parents' liability is even stricter (on this below no 8/260 ff) and victims thus tend only to resort to this; this is also encouraged by the fact that parents usually have relevant insurance cover and in addition they are more likely to be financially able to meet compensation claims. However, it should not be forgotten that in those – admittedly seldom – cases in which there is no insurance cover for all or part of the damage and the parents are not in a position to pay compensation either, the strict liability for children can certainly become applicable; this is frequent especially in the case of very severe damage, which can lead to an especially onerous burden for children. Apart from this, the basic concerns that **8/242**

506 *Will/Vodinelic,* Generelle Verschuldensvermutung – das unbekannte Wesen. Osteuropäische Angebote zum Gemeineuropäischen Deliktsrecht? in: Magnus/Spier (eds), Liber amicorum for Helmut Koziol 302.

507 See *Koziol,* Kinder als Täter und Opfer: Kernfragen rechtsvergleichend betrachtet, Haftung und Versicherung (HAVE) 2014, 89 ff on this and on the following point.

children, like mentally ill people, are exposed to particularly strict liability rules despite their special worthiness of protection remain unanswered.

8/243 Nonetheless, the basis for this rule becomes understandable when one firstly calls to mind the French tendency to generate as much compensation as possible for the victim for the damage he has suffered, and secondly one bears in mind the fact that children represent a special source of danger. However, as the general public has an eminent interest in them, it would not be objectively reasonable for the individual victim alone to have to bear the damage which was inflicted upon him by a source of danger in which the general public has a strong interest. Further, it must also be taken into account that children's extensive liability risk is usually covered by liability insurance.

8/244 Nonetheless, it does not seem appropriate at all that children bear the full burden of liability when there is no liability insurance or when the insurance does not cover all of the damage, as can happen above all when the sums involved are very high. A tenable solution could be found if all damage, even very severe damage, that is caused by objective misconduct on the part of children is shifted to the general public for social reasons and thus covered by comprehensive *»social liability insurance«,* with the premium structure not dependent on the extent of the insured risk but borne by all members of society, like social security contributions, in accordance with their income. This would be in harmony with the idea that damage caused by the misconduct of children, whose existence is in the public interest, is also borne by the public and not by individual victims or by parents.

8/245 As long as this approach of shifting the damage caused by children to society in general is not taken, in principle a solution requiring fault should certainly be preferred in the field of the law of damages. As to the more exact structure of this, while the concept of legal certainty can be used to argue for rigid *age limits,* the counter-arguments would seem to outweigh this concern: this concerns subjective imputation and as the personal development of children varies quite considerably and in diverse situations very different powers of discernment are required, rigid age limits thus lead to results which in individual cases cannot be objectively justified. The uncertainties are in any case no greater than when it comes to assessing the accountability of people with cognitive disabilities. Legal certainty and justice in the individual case can, moreover, be achieved optimally by a median solution, namely by introducing rebuttable presumptions which are linked to age limits appropriate to the typical development of children.

8/246 As regards the decision on whether to allow children's liability – alongside that of their parents – to apply or only *subsidiary* in cases where the victim cannot get any compensation from the parents, a case can be made for both sides: on the one hand, it would seem pragmatic for reasons of deterrence to adhere to the general liability rule and always make children liable when they have acted culpably; this aspect would be neglected if liability was only subsidiary as the parents

who paid compensation would not be able to take recourse against the children either[508]. On the other hand, it must be borne in mind that victims will usually sue the parents as they are far more likely to be financially able to compensate the damage and also usually have to discharge their children's compensation duties anyway. Beyond this, it must be considered that when parents are liable, they have neglected their duties toward the child – including those to protect the child against duties to compensate, and thus it seems reasonable that only the parents are liable. This also creates an incentive for parents to fulfil their duties of child-rearing and supervision better than before. Both solutions, therefore, have a case to be made for them.

8/247 Similar fundamental questions also arise in respect of *persons who are not accountable for their actions.* Once again, the extreme French approach with strict liability of mentally ill persons highlights a basic problem, which requires closer consideration. Those from legal systems – numerically in the majority – in which the special vulnerability of mentally ill persons is emphasised and their liability accordingly negated, will have a hard time understanding that precisely this increased vulnerability leads to harsher liability rules. Nonetheless, as in the case of children, here too there are substantial arguments that can be presented in favour of the French approach. While certainly there is no particular interest on the part of society in having people be mentally ill – quite the contrary – it must nevertheless be borne in mind that society must consider general human rights and allow the mentally ill – albeit definitely within certain limits – to participate in social life. This will, however, give rise to unavoidable risks and it would again be unreasonable to allow the individual victim to bear the effects of this risk alone when it ultimately exists in the interest of society, which has to ensure such persons live in a manner that is consistent with human rights. A solution that, on the one hand, considers the special need to protect mentally ill people against compensation duties, but on the other hand also protects the victim from having to bear the negative effects of a risk that exists in society's general interest alone and thus makes compensation of damage in the case of objective misconduct by the non-accountable person appear necessary, can once again only be arrived at by having society as a whole bear the risk. The idea here too would be to conceive »social liability insurance«, to be financed by the general public.

508 This is argued with respect to Austrian law, see *Hirsch,* Children as Tortfeasors under Austrian Law, in: Martín-Casals (ed), Children in Tort Law I 48 f.

4. The de minimis rule

8/248 As regards any de minimis rule, it appears to me[509] that in the field of *pecuniary damage* in any case there should be no threshold as this would be too rigid a limitation, meaning it would not be possible to take account of the individual circumstances of the victim. However, it is certainly possible to draw on the approach widespread in the law of neighbours to say that each member of society will have to tolerate minor impairments that are hard to avoid in everyday co-existence[510]; so that to this extent the protection of legal goods is generally limited. Any special rule is, however, of little practical importance as the efforts and costs of asserting claims for minimal damage will make such more or less prohibitive anyway.

8/249 In the case of *non-pecuniary damage,* however, there should be an explicit limit: insofar as the sum involved is minor, for example, damages for pain and suffering in respect of having someone step on one's toes in the throng at a station, once again this will in practice hardly be pursued, but there should be a further limit, as is already the case anyway in most legal systems. It seems fair to limit compensation to substantial non-pecuniary damage. Applying such a threshold is reasonable here because the compensation payment does not compensate any pecuniary loss which might influence the victim's living circumstances; non-pecuniary harm, which cannot be measured in money, is at issue. This limitation does, however, cause concern in that the non-pecuniary goods, in particular personality rights, are actually ranked above pecuniary goods and thus ought to be accorded greater protection. However, it must be considered that the compensation of non-pecuniary damage is very difficult as this is hard to determine objectively and measuring the compensation amount is also very difficult. Furthermore, it must be considered that as part of co-existing in a society, certain non-pecuniary nuisances must also be tolerated as otherwise this co-existence would be over-burdened with compensation duties. Moreover, there would be a risk that compensation payments for emotional damage would actually increase sensitivity in this respect and thus actually worsen the non-pecuniary harm sustained rather than assuaging it, thus contravening the notion of compensation of damage. At least in the case of minor non-pecuniary damage, it is worth considering – drawing inspiration from the French approach – a simple court declaration of fact of the wrongful interference, without imposing any duty to compensate[511]. The de minimis threshold must necessarily be very elastic, in particular in that it must have regard to the rank of the infringed interest, the objective determinability of the impairment and whether there are objective indications for the extent of the harm.

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509 See Basic Questions I, no 6/32 f.

510 In the underground one passenger stepped on another's shoe and the latter sustained a scratch; a dust cloud which formed at a building site dirtied the clothes of a passer-by.

511 *Moréteau,* France no 1/169; on this below no 8/320.

III. Liability for other defects in one's own sphere

A. Misconduct of auxiliaries

1. Comparative review

There is great reticence regarding the regulation of liability for auxiliaries in the extra-contractual context in German law: the principal can free himself from liability for the misconduct of auxiliaries when he proves that he exercised the necessary *care when selecting and instructing* them. Still, this clearly acknowledges that the principal has such selection and supervision duties – a type of Verkehrspflichten (safety duties). Polish and Hungarian law[512] take the following approach: the principal is liable for fault in selection or supervision and there is a presumption that such fault exists[513]. In Austrian law[514], the principal is liable beyond this when – even if free of fault – he has used an unsuitable auxiliary; this is strict liability based on the creation of a special source of danger. **8/250**

The other legal systems go further than this by refraining from taking a principal's misconduct as a prerequisite: pursuant to art 1384 Code civil in France, there is liability for the *objective misconduct of those persons for whom one is responsible*[515]. In Norway[516] the principal is »liable whenever his employee causes damage in a culpable way within the scope of employment. The strict liability rule for the principal is justified by the fact that the employer and the employee have a close and lasting relationship with the purpose of supporting the interests of the principal.« »Very short, unpaid services, for instance a neighbour buying bread« do not lead to this strict principal's liability. In Japan, regard is had to the fault of the principal but this is presumed and there is such a high standard for proving lack of fault that ultimately there is liability independent of fault[517]. **8/251**

Principals' liability in England is strict[518]. *Oliphant* explains the reasons behind this: »The justifications for this liability are much debated, but it is generally accepted that they rest on a combination of different considerations, including **8/252**

512 *Ludwichowska-Redo,* Poland no 3/123 (on independent auxiliaries); *Menyhárd,* Hungary no 4/129.

513 There is no substance to the concerns that this cannot be fault in the real sense as the selection cannot be wrongful: there is indeed – as mentioned in the text on the German law – a »*Verkehrssicherungspflicht*« (duty to protect others against risks that have been established by one's activity or property) to select auxiliaries so that no danger to third parties emanates from them.

514 For a recent and detailed publication on this *Ondreasova,* Die Gehilfenhaftung (2013) 97 ff.

515 *Moréteau,* France no 1/180.

516 *Askeland,* Norway no 2/87; the same is true under Polish law in the case of non-independent auxiliaries *(Ludwichowska-Redo,* Poland no 3/124).

517 *Yamamoto,* Japan no 7/630 ff.

518 *Oliphant,* England and the Commonwealth no 5/133.

efficient loss distribution, providing a just and practical remedy to prevent the injured person going uncompensated and, insofar as the employer chooses whom to employ and has control over what is done, deterring future harm.« Likewise, the USA[519] follows the principle of »respondeat superior«: »Employers are vicariously liable for harm tortiously caused by an employee within the scope of employment. The liability of the employer is, thus, strict, but liability requires fault on the part of the employee.« The fundamental principle is seen in the – abstract – possibility of control. There is also reference to the notion of deterrence: the principal is called upon to be particularly thorough and careful when selecting and supervising; he is given an incentive to discipline auxiliaries following misconduct and beyond this, he is encouraged to replace auxiliaries with machines.

8/253 These arguments cannot be considered very convincing: the first goal could also be achieved by fault-based liability – in particular linked with a reversal of the burden of proof; the second goal is merely a variation of the first. The third goal, to encourage principals via the strict rules on liability to make employees redundant and replace them with machines, is not in line with the general aims of our society, especially in times of high unemployment.

8/254 Despite the lack of adequate justification, PETL (art 6:102) and the DCFR (art VI.–3:201) also follow the international trend and provide for comprehensive liability in the case of misconduct by *Besorgunsgehifen* (vicarious agents).

8/255 In the French report[520] reference is made to a rule in the draft Catala (art 1360) and thus to a practically speaking very significant but rarely ever discussed problem, namely the liability of parent companies for their *subsidiaries;* the issue must be the same when instead of a parent company we have an individual. Although the subsidiary is legally an independent legal subject, there is a lot to be said for seeing it differently in the light of rules on auxiliaries' liability, specifically not as an independent company, if it is largely under the influence of the parent company. It must also be considered that any other solution would mean that the limited liability of corporate entities could be exploited in order to outsource activities likely to cause damage and thus essentially to shift the risk away from parent companies.

2. Conclusions

8/256 The approaches taken by the legal systems when imputing misconduct of auxiliaries varies greatly. As it is generally recognised that one is not as a rule accountable for third-party actions – explicitly, for example in § 1313 of the Austrian Civil Code, the ABGB – departing from this so radically in the case of auxiliaries will

519 *Green/Cardi,* USA no 6/143 ff.
520 *Moréteau,* France no 1/188.

require weighty arguments: liability for third-party actions can only be justified within a *consistent overall system* when there are correspondingly grave grounds for imputation, like the grounds that are stipulated for liability in the case of one's own culpable behaviour or in the case of liability for dangerous things[521]. The entire framework of grounds for imputation must be considered and the liability for other persons must not be based on weaker grounds overall than for all other types of liability. To argue that someone deployed another person in their own interest cannot provide a sufficient basis to make the principal accountable for all the damage caused in the course of carrying out the task assigned. Certainly it is right to point out that in any case it is generally recognised as a prerequisite that the auxiliary be guilty of misconduct and when there is a serious defect within the sphere of a person, this may justify imputing damage to that person where it is caused by such defect. However, the decisive question is when someone can be considered as belonging to the sphere of another person, thus making it seem right that this second person be liable for the misconduct of the former. It must be remembered that each person, ie also an auxiliary, is in principle responsible for his own conduct and that liability for another person cannot be imposed without further ado upon anyone else.

8/257 The international debate in this respect obviously must still go into a lot more detail and differentiation[522]. Nonetheless, progress has already been made in some legal systems where very short, unpaid services do not suffice for imputation of the auxiliaries' fault. But should it be sufficient to impose liability on a person who pays a messenger a fee to take medicine to a sick friend? Can the completely altruistic interest in helping the friend justify imposing the burden of liability on the auxiliary? Should it not also depend on the intensity of how the auxiliary is integrated into the sphere of the principal[523], in particular the possibility for the principal to influence the behaviour of the auxiliary on the road, for example? Is the power to influence sufficient when someone, for lack of his own abilities, engages an expert entrepreneur, whom he obviously is not in a position to instruct on how to do things[524]? Ought it not also to be taken into account that by engaging an expert he has actually reduced the risk that third parties be injured[525]?

8/258 Therefore, I have *not* yet seen any arguments to convince me that there should be a general strict liability for principals in the extra-contractual field (see Basic Questions I, no 6/96); to my mind the better arguments speak in general for nar-

521 See Basic Questions I, no 6/95 ff in respect of all of the above.

522 Thus, also *Giliker,* Vicarious Liability or Liability for the Acts of Others in Tort: A Comparative Perspective, JETL 2011, 31, 54 ff.

523 On this *Ondreasova,* Gehilfenhaftung 103 ff.

524 This is also taken into consideration in France *(Moréteau,* France no 1/188) and in Poland *(Ludwichowska-Redo,* Poland no 3/124).

525 This is also pointed out in France, see *Moréteau,* France no 1/184.

rower liability for presumed fault in selecting or supervising auxiliaries. A concession could be made towards the broad counter-position, however, insofar as – like in Austrian law – strict, no-fault based liability is recognised if the auxiliaries are incompetent and thus a *source of particular danger* has been created. Further, it could be objectively argued that more extensive liability for auxiliaries should be recognised in respect of *entrepreneurs.* After all, the same arguments as in favour of stricter enterprise liability could be brought, for instance, in connection with the serious defect within the sphere of the entrepreneur, namely the misconduct of the auxiliary within the context of his activity for the enterprise. Furthermore, it would seem proper to consider whether the principal ought, in terms of aims and purposes of tort law, to carry the ultimate responsibility for the carrying out of the duties for which he has engaged the auxiliaries[526]. Accordingly, when duties in the interim area between contract and delict are breached, for example duties to protect others against risks one has established by one's activity or property *(Verkehrssicherungspflichten),* a more extensive imputation of the auxiliaries' conduct seems justified. It seems completely unreasonable to me in any case that there be a general strict liability for Besorgungsgehilfen (vicarious agents) in the private field.

B. Misconduct of children

1. Comparative review

8/259 Most legal systems make parents liable for – objectively negligent[527] – infliction of damage by their children only if the *parents* can be held accountable for *misconduct* themselves, above all for a breach of their supervision or at least child-rearing duties, though there are variations in that the majority of legal systems make the liability rules stricter by reversing the burden of proof[528]. Both PETL (art 6:101) and the DCFR (art VI.–3:104) have chosen the option with the reversal of the burden of proof. Spain and the Netherlands also have similar liability rules, beyond this however also a *strict liability of parents:* in Spain for the specific case that the child commits a criminal act[529]; in the Netherlands for the broad area of liability

526 See *Ondreasova,* Gehilfenhaftung 119 ff.

527 This prerequisite is rightly emphasised, for instance, by *Brüggemeier,* Haftungsrecht: Struktur, Prinzipien, Schutzbereich (2006) 528.

528 See above *Ludwichowska-Redo,* Poland no 3/121; *Menyhárd,* Hungary no 4/114; *Oliphant,* England and the Commonwealth no 5/133; on the German speaking countries see Basic Questions I, no 6/98; see besides this the country reports and the comparative reports in *Martín-Casals* (ed), Children in Tort Law I: Children as Tortfeasors (2006), Children in Tort Law II: Children as Victims (2007); *Spier* (ed), Unification of Tort Law: Liability for Damage Caused by Others (2003); *van Dam,* Tort Law² 493 ff; and finally *Koziol,* HAVE 2014, 96 ff.

529 *Martín-Casals/Ribot/Solé Feliu,* Children as Tortfeasors under Spanish Law, in: Martín-Casals (ed), Children in Tort Law I 369 ff, 387 ff.

for children under 14 years of age[530]. These two legal systems represent the middle ground leading up to Norwegian[531] and French law[532]. In Norway, the parents have liability independent of fault for misconduct by their children. French law even goes one step further: according to present-day interpretation, art 1384 para 4 Code civil sets out not only a strict liability of parents for damage inflicted by their children so that such can only free themselves from the duty to compensate by proving force majeure, but notably courts apply this liability for *each and every* injury inflicted by children, ie even when the child's behaviour was not objectively negligent and thus an adult would not be held liable for the same conduct.

2. Conclusions[533]

8/260 The mostly fault-based liability of parents means that family law *supervision duties* are extended outward as it were and endowed with a third-party protective character[534]. This can be justified by the notion behind duties to protect others against risks one has established by one's activity or property (Verkehrssicherungspflichten)[535]: children generate special risks because they are not yet able to recognise dangers and behave appropriately. Those in whose sphere of responsibility the source of increased danger lies and who can thus take measures to avert or reduce the risk to others, have the duty to avoid damage occurring as far as is possible, including an obligation to take action within the limits of what is reasonable[536].

8/261 However, what justification can be found for how French law imposes a strict, *no-fault based* liability upon parents (art 1384 para 4 Code civil) and only frees them from liability in case of force majeure? *G. Wagner*[537] rightly emphasises that children are obviously by no means comparable with sources of extraordinary danger such as motor vehicles and nuclear power plants and that, therefore, any strict

530 *van Boom,* Children as Tortfeasors under Dutch Law, in: Martín-Casals (ed), Children in Tort Law I 293 ff, 296.

531 *Askeland,* Norway no 2/98.

532 *Moréteau,* France no 1/180 at FN 433; further *Francoz-Terminal/Lafay/Moréteau/Pellerin-Rugliano,* Children as Tortfeasors under French Law, in: Martín-Casals (ed), Children in Tort Law I 169 ff, 193 ff.

533 On the following in more detail *Koziol,* HAVE 2014, 93 ff

534 *G. Wagner* in MünchKomm, BGB V[6] (2013) § 832 no 2. Cf also *von Bar,* Gemeineuropäisches Deliktsrecht I (1996) nos 100, 140.

535 In this sense, for example, also *Hirsch,* Children as Tortfeasors under Austrian Law, in: Martín-Casals (ed), Children in Tort Law I 40, and *Wagner* in MünchKomm, BGB V[6] § 832 no 2 in combination with § 823 no 320 ff.

536 Cf *Brand,* Die Haftung des Aufsichtspflichtigen nach § 832 BGB, JuS 2012, 673; *Larenz/Canaris,* Lehrbuch des Schuldrechts[13] II/2 (1994) § 76 III 4c; *Jaun,* Haftung für Sorgfaltspflichtverletzung. Von der Willensschuld zum Schutz legitimer Integritätserwartungen (2007) § 10, 455 f.

537 Final Conclusions: Policy Issues and Tentative Answers, in: Martín-Casals (ed), Children in Tort Law II 299 f.

liability of parents is basically wrong. This objection is valid in respect of other legal systems but problematic as regards French law: art 1384 para 1 Code civil is currently interpreted as meaning that the keeper of a thing is strictly liable for the damage caused by this thing, regardless of whether the thing is faulty or dangerous[538]. The strict liability of parents for their children thus fits without conflict into the other French rules on liability. In principle the question, however, is how such strict liability of parents can be objectively justified, whereby it must be considered that, besides especial dangerousness, there can be other reasons for liability independent of fault, one example being product liability[539]. Thus, it is necessary to look more closely at the reasons given for French strict liability of parents. Firstly, this corresponds to the general basic tendency to focus primarily on the compensation of the victim and thus be very generous in this sense as regards the prerequisites for liability[540]. Further, the risk of damage that emanates from children is used as an argument[541]. Above all, however, it is emphasised that almost all families have insurance policies that cover the liability of parents and children; as taking out such policies is not obligatory but after all intensively promoted and thus almost all the population has such cover, the premiums are very inexpensive.

8/262 *G. Wagner*[542] highlights the full compensation of the victim, the extensive distribution of risk and the low processing costs as the advantages of the French approach. He sees the *disadvantages* in: the low incentive to be careful when it comes to supervising and child-rearing as a result of the extensive insurance coverage, whereby the amount of the premium is not dependent on the risk[543]; the burden borne by families in the – albeit very low – costs of insurance for this far-reaching liability; and the preference of the victim of damage caused by children over victims of damage caused by adults in that parents are accountable for damage caused by their children in cases where adults – for lack of wrongfulness – would not be liable for the same actions. *Wagner,* therefore, does not endorse the French approach. I would agree with him, in particular when one considers that the argument that stricter liability is balanced by inexpensive liability insurance by no means always applies, since such insurance is not compulsory and not every single household has such insurance and, on the other hand, insurance companies no doubt limit coverage to a certain maximum sum. In any case, where there is no

538 *Moréteau,* France no 1/180; *Galand-Carval,* Strict Liability under French Law, in: B.A. Koch/Koziol (eds), Unification of Tort Law: Strict Liability (2002) 132.

539 See Basic Questions I, no 6/202.

540 France no 1/153; further *Francoz-Terminal/Lafay/Moréteau/Pellerin-Rugliano* in: Martín-Casals (ed), Children in Tort Law I 193.

541 *Francoz-Terminal/Lafay/Moréteau/Pellerin-Rugliano* in: Martín-Casals (ed), Children in Tort Law I 194.

542 In: Martín-Casals (ed), Children in Tort Law II 294 ff.

543 *Francoz-Terminal/Lafay/Moréteau/Pellerin-Rugliano* in: Martín-Casals (ed), Children in Tort Law I 185 f.

insurance coverage, the parents will be subject to the full harsh burden of the very strict, excessive liability.

Nonetheless, the French approach could offer inspiration for a new type of so- **8/263**
lution: by promoting the conclusion of policies that cover the liability of parents, the damage caused by children should largely be shifted to society as a whole. This is not fully the case today as insurance is not obligatory and, moreover, the costs for family insurance are borne by families and not the general public. However, one idea would be to logically follow through on the notion that society as a whole has an interest in people bearing children and, therefore, that the general public should also bear the costs of liability for damage caused by children. This could be realised, for example, in the form of unlimited *social liability insurance* for damage caused by children, with such being financed by the general public. Just like all the already existing social security insurances, the costs would not only be borne by those potentially liable later but by all those who have to pay social security contributions, without regard as to how likely the insured party is to constitute a risk. However, if the risk is thus shifted to society as a whole, there will no longer be any liability law incentive for parents to be diligent in child-rearing and supervision.

C. Defective things

Defective things within the sphere of the defendant play a considerable role in **8/264**
the German legal family, for instance in the cases of buildings, paths and motor vehicles. The defectiveness of things can lead to stricter liability due to a reversal of the burden of proof as regards fault because of the *concrete danger* associated with the things in question or the waiving of subjective fault as a prerequisite for liability; the defects may also lead to stricter rules on liability for dangerousness. Polish and Norwegian law also provide for stricter rules on liability due to the defectiveness of things[544]; in Japanese law there are stricter liability rules in respect of damage as a result of defective constructions[545]. France goes furthest[546], making the keeper of any defective thing liable independent of fault on the basis of the wide-ranging interpretation of art 1384 Code civil. As shown by *Moréteau,* this view is also based to a certain extent on a weak version of the notion of wrongfulness, namely that the keeper has not maintained the thing duly and properly. In Hungary,

544 *Ludwichowska-Redo,* Poland no 3/126 f; *Askeland,* Norway no 2/112.
545 *Yamamoto,* Japan no 7/654 ff.
546 *Moréteau,* France no 1/156.

England and the USA, on the other hand, this aspect in respect of stricter liability rules is unknown[547].

8/265 **Conclusions:** in all those legal systems in which the dangerousness of the situation plays a role in establishing the duties of care, it could or indeed should play a role when defective things are at issue, as the dangerousness of things is usually increased by the defect and this would support increasing the duties of care.

IV. Dangerousness

A. Comparative review

8/266 In the German speaking countries[548], special dangerousness is recognised besides fault as an important *element establishing liability* and, hence, there is even talk of a two-lane liability system; the legislator has not, however, been bold enough yet to take the step to introduce a blanket clause. The diversity of European legal systems was already mentioned in Basic Questions I and is detailed, of course, in the country reports: in France, art 1384 Code civil is interpreted as meaning that the »gardien« is liable independently of fault, yet this liability does not depend on the liability element of special dangerousness but is at most sometimes part of the consideration of dangerousness increased by some defect[549]. The situation in Poland, on the other hand, corresponds to that in the German speaking countries[550]; the same applies to Japan[551], whereas the Hungarian legislator has provided a general rule for liability based on dangerousness[552]. In Norway, the courts have developed a general liability based on dangerousness[553]. In the USA, liability for »abnormally dangerous activity« is recognised[554]; in England there is great reticence even in relation thereto[555].

8/267 The European Group on Tort Law merely managed a general rule for »abnormally dangerous activities« (art 5:101 PETL), which in any case should not apply when »common usage« is concerned; driving motor vehicles, for instance, is accordingly not covered. The DCFR – following the example of some national legal

547 *Menyhárd,* Hungary no 4/140; *Oliphant,* England and the Commonwealth no 5/134; *Green/Cardi,* USA no 6/149.
548 Basic Questions I, no 6/139 ff.
549 *Moréteau,* France no 1/157.
550 *Ludwichowska-Redo,* Poland no 3/127 ff.
551 *Yamamoto,* Japan nos 7/369 ff and 673 ff.
552 *Menyhárd,* Hungary no 4/141.
553 *Askeland,* Norway no 2/102.
554 *Green/Cardi,* USA no 6/153 ff.
555 *Oliphant,* England and the Commonwealth no 5/135.

systems – has not set up any general rule but merely lists some individual sources of danger (art VI.–3:201 ff).

B. Conclusions

The *basic principles* of liability based on dangerousness can be described as follows[556]: firstly, that damage is better imputed to the party whose interest the special but admissible source of danger served; secondly, it makes more sense to impose liability on the party who can influence the source of danger (control of the risk). If it is recognised that the special danger is generally a factor that can justify liability independent of fault, it is in line with the principle of equal treatment that this be regulated in a general rule; the special rules for individual sources of danger lead in any case to a contradiction within the overall legal system. The substantial difference in viewpoints as regards the scope seem more or less insurmountable so far, as strict liability in the common law is only recognised for extraordinarily dangerous activities but not, for instance, for the ordinary dangers of road traffic. As regards this issue, there were also irreconcilable differences of opinion in the European Group on Tort Law. Comprehensive debate is thus still essential in order to at least find some kind of minimal consensus. **8/268**

However, it is possible that the difference lies only in respect of the explicit label and systematic classification of the liability. For there is reason to believe that even where no strict liability is foreseen, in fact liability will be recognised independently of fault since, possibly due to the very dangerousness of motorised road traffic, the *duties of care* are *stretched to the extent*[557] that a normal participant in road traffic cannot comply with them and thus, in fact strict liability based on dangerousness is applied, albeit not in name[558]. It was apparently in this manner that liability based on dangerousness developed in Norway[559]. Only an exact analysis of English decisions would make it possible to determine if this is really the case in England; however, this would not only require a lot of work but also be very difficult as the descriptions of the facts in the decisions do not make it easy to tell what the relevant circumstances were, in fact sometimes it is impossible. If there is such a covert liability based on dangerousness, given the extensive overlap in **8/269**

556 See Basic Questions I, no 6/139; further *Yamamoto,* Japan nos 7/369 ff and 673 ff.

557 On the creation of liabilities based on latent danger see *van Dam,* Tort Law² 302 ff; *Wagner* in MünchKomm, BGB V⁶ Vor § 823 no 25; *P. Widmer,* Standortbestimmung im Haftpflichtrecht, Zeitschrift des Bernischen Juristenvereins 110 (1974) 289; *P. Widmer,* Fonction et évolution de la responsabilité pour risque, Zeitschrift für Schweizerisches Recht 96 (1977) 421 f; *Widmer* in: Zimmermann (ed), Grundstrukturen des Europäischen Deliktsrechts (2003) 168.

558 See *Gilead,* Israel, in: Koch/Koziol (eds), Unification: Strict Liability 184.

559 *Askeland,* Norway no 2/108.

practical terms, it would primarily only be the open recognition of such that is at issue, something which would not only be desirable for systematic reasons, but also in order to straighten out distortions within fault-based liability.

V. Economic capacity to bear the burden

8/270 Polish law accords relatively weighty significance to the notion of economic capacity to bear the burden[560], namely in the case of liability for personal injury that is sustained by lawful exercise of state power, the liability of children and persons with cognitive disabilities and of people who keep animals; furthermore, the reduction clause refers, inter alia, to this criterion. In Hungary[561], the notion of capacity to bear the economic burden plays a role in the application of a principal's liability for his auxiliaries; furthermore, this criterion is invoked, among others, when the reduction clause is applied.

8/271 In England[562] and the USA, on the other hand, this criterion is almost unknown as an element influencing liability[563]. Given the explanations in the US report, it must be pointed out, however, that this factor does not depend simply on the wealth of the tortfeasor, but a weighing up of the capacity to bear the economic burden on both sides and, moreover, prevailing opinion is that this concerns not merely wealth but generally how capable each party is of bearing the burden, something which may also be influenced by whatever insurance policy they have.

8/272 **Conclusions:** in Continental Europe, the criterion of capacity to bear the economic burden is certainly recognised as a factor that may tip the scales in *borderline cases.* Whether it is possible to find consensus in the common law for this »supporting function« seems dubious. Once again, if an investigation of case law came to the conclusion that this criterion was in fact being used nowadays by the courts in a covert manner, this would have persuasive power.

560 *Ludwichowska-Redo,* Poland no 3/136.
561 *Menyhárd,* Hungary no 4/148.
562 *Oliphant,* England and the Commonwealth no 5/138.
563 *Green/Cardi,* USA no 6/156.

VI. Realisation of profit

The Polish report stresses that realisation of profit constitutes a material argument for recognising risk-based liability, ie liability based on dangerousness[564]. In Hungary too, this is seen as a general principle of risk allocation, which is significant in particular in respect of liability for auxiliaries[565]. In England, this criterion does not play any great role; it is only mentioned in the context of liability for auxiliaries and product liability[566]. **8/273**

Conclusions: while the fact that this criterion has not managed to systematically and dogmatically permeate English case law so much means there has not been any detailed discussion there, it is unlikely that there will be any resistance to it as a basic principle that may play a role when recognising certain types of liability. **8/274**

VII. Insurability and having insurance cover

The possibility of inexpensive *insurability* of the insurance risk plays a decisive role in France when affirming a strict, no-fault based liability of parents for the damage caused by their children[567]. In Poland[568] too, insurability is seen as a relevant factor when introducing no-fault based liability. Whether there is in fact insurance coverage in the specific case, on the other hand, is held to be irrelevant when affirming liability, except in cases of liability on grounds of equity in which the financial situation is taken into account. In Hungary[569], by comparison, there is noticeably more willingness to award compensation when the damage is *covered by liability insurance.* In England[570], no significance is accorded to whether there is insurance cover; nothing is said about insurability. In the USA[571], insurability has played a role in structuring product liability but also in abolishing »family immunity«, as claims among members of a family are often covered by insurance anyway. **8/275**

Conclusions: It may be common that courts show greater willingness to award compensation claims when damage is *covered* by insurance. In principle, how- **8/276**

564 *Ludwichowska-Redo,* Poland no 3/138.
565 *Menyhárd,* Hungary no 4/148.
566 *Oliphant,* England and the Commonwealth no 5/138.
567 *Moréteau,* France no 1/153.
568 *Ludwichowska-Redo,* Poland no 3/139.
569 *Menyhárd,* Hungary no 4/150.
570 *Oliphant,* England and the Commonwealth no 5/138.
571 *Green/Cardi,* USA no 6/158 f.

ever, it must be borne in mind that liability insurance policies may not be allowed in themselves to give rise to compensation claims, but only to cover compensation duties that exist independently of the insurance cover. In particular in case of doubt, however, it will be very difficult to prevent existing liability insurance policies being taken into consideration.

8/277 It seems reasonable that *insurability*[572] and thus the notion of »loss spreading« can become relevant in respect of introducing no-fault based elements of liability in that it influences the assessment of whether liability is reasonable.

VIII. Risk community

8/278 The notion of risk communities certainly plays a role in Hungary and reference is also made to its importance in respect of *product liability*[573]. In English law, on the other hand, this idea is not generally taken into consideration[574].

8/279 In their US report[575], which concentrates on product liability and liability for road traffic accidents, *Green/Cardi* point out, firstly, that markets are often divided because some consumers buy safe and others less safe products and thus there is no risk community; and, secondly, that people with larger incomes often suffer far greater loss of income due to injuries and therefore receive larger compensation payments, so that ultimately the poorer segments of society financially support the richer since they pay the same price but receive almost no compensation if injured. Such redistribution via product liability would not seem to be very just or desirable. But I am not so sure that *Green's* and *Cardi's* objections are justified: Their argumentation is convincing only if you solely take regard of one and the same product; but usually rich people buy products which are more expensive and I assume that they therefore ultimately pay a higher contribution to the entrepreneur's »liability funds«. Therefore, I feel that it is – at least roughly – a justly designed risk community.

8/280 *Green's* and *Cardi's* ultimately not convincing concerns about product liability do call to mind, however, that here in Europe we have different compensation

572 On insurability see *Faure/Grimeaud,* Financial Assurance Issues of Environmental Liability, in: Faure (ed), Deterrence, Insurability, and Compensation in Environmental Liability (2003) 207 ff; G. *Wagner,* (Un)insurability and the Choice between Market Insurance and Public Compensation System, in: van Boom/Faure (eds), Shifts in Compensation Between Private and Public Systems (2007) 87 ff.

573 *Menyhárd,* Hungary no 4/151.

574 See also *Oliphant, Rylands v Fletcher* and the Emergence of Enterprise Liability in the Common Law, in: Koziol/B.C. Steininger (eds), European Tort Law 2004 (2005) 81 ff on this.

575 *Green/Cardi,* USA no 6/160 f.

systems which exist alongside each other, which are directed at the compensation of the same damage but include *different risk communities* and therefore also exert different redistributive effects and moreover, recourse rights in turn lead to redistribution in another direction. This is shown most clearly in relation to damage resulting from road traffic accidents: personal injuries are largely covered by social security, to which people with higher incomes pay higher contributions and these are the same individuals who suffer greater loss of income. Further, there is strict liability covered by compulsory liability insurance policies, in which context those who keep larger and thus more expensive motor vehicles also pay higher premiums, so that here too there is by no means the redistribution from poor to rich complained of by *Green/Cardi.* Moreover, when the accident is caused by a defect in the motor vehicle, there is also the strict liability – which is possibly also covered by liability insurance – of the producer functioning as a type of insurance centre, whereby the price structures and thus the distribution of the liability sums will be difficult to understand. However, it may be assumed that the purchasers of more expensive vehicles also pay greater contributions to the liability fund, so that once again the redistribution in the direction feared by *Green/Cardi,* from low-earners to high-earners, does not take place. Nonetheless, there are in any case three different risk communities with different rules on contributions and thus different redistributive effects, which may be altered again by the possibility of recourse claims.

8/281 This is certainly not a pleasing, economically well-structured, inexpensive overall system that coherently implements the notion of a risk community. Therefore, it would be necessary to consider how to *align* the competing compensation systems, whereby the above-described (no 8/74 f) Scandinavian approach deserves attention.

IX. The interplay of imputation criteria

8/282 More attention should certainly be paid to the interplay of the criteria for imputation in those legal systems in which more regard is had to the overall system; this is less likely in common law countries. In the Continental European reports, however, the interweaving of the different criteria for imputation are not discussed in very great detail but in Norway and Hungary it is at least taken into consideration[576].

576 *Askeland,* Norway no 2/107 ff; *Menyhárd,* Hungary no 4/152 ff.

8/283 The *US report* even gives the impression that recognising the interplay is difficult[577]: it is very obvious that a reversal of the burden of proof is not only provided for as regards fault but also that it can be used to pursue different aims and this is not disputed in any way. In Basic Questions I[578], however, the issue was precisely the interplay of the two elements of fault and dangerousness. If some legal systems provide for a reversal of the burden of proof as regards fault on the basis of increased dangerousness, this means even presumed and not only proven fault is sufficient to found liability, which is undoubtedly a more stringent form of fault-based liability, which is provided for precisely because of the increased danger[579]. Further, finding that the dangerousness of the situation leads to increased duties of care does not mean that liability is no longer dependent on misconduct but rather it merely shows that the element of dangerousness already plays a role even within the context of fault-based liability in that it increases the duties of care and thus intensifies liability to a certain extent. If attempts are further made to conceal this fact by maintaining that »reasonableness« is the applicable yardstick as regards duty of care, this invocation of that largely empty phrase in reality tells us nothing; when it is elaborated that it is precisely the increased dangerousness that render the increased duties of care »reasonable«, this helps towards recognising the material factors and thus towards understanding decisions. The case-by-case examination familiar in the common law is also reflected when it is pointed out that the notion of enterprise liability only plays a role in the case of product liability, but it is not further considered whether the basic principles ought to lead to a broader scope in order to comply with the principle of equal treatment. When the difficulty of proving proof is ultimately cited as a justification for strict product liability, it may generally be countered that typically there is no fault in cases of runaways and apart from this, such difficulty can hardly justify strict liability but only an intensification of liability by a reversal of burden of proof, ie the presumption of fault. When, beyond this, the especial dangerousness of the defective product is cited as a reason for the strict liability, this does address a decisive idea, namely increased danger; when limited to such cases, no-fault based liability could be justified. Ultimately, it seems to me that the US law can certainly offer valuable starting points for reconsidering the European approach to product liability.

8/284 **Conclusions:** As it has long been recognised that shifting the damage from the victim to the injuring party does not depend only on one factor and mono-

577 *Green/Cardi,* USA no 6/162.

578 Basic Questions I, no 6/189.

579 On intensifying the liability by reversing the burden of proof see *B.C. Steininger,* Verschärfung der Verschuldenshaftung (2007) 72 ff; *Karner,* The Function of the Burden of Proof in Tort Law, in: Koziol/B.C. Steininger (eds), European Tort Law 2008 (2009) 68 ff; cf also *Ulfbeck/Holle,* Tort Law and Burden of Proof – Comparative Aspects. A Special Case for Enterprise Liability? in: Koziol/B.C. Steininger (eds), European Tort Law 2008, 26 ff.

causal theories must be rejected, more weight should be accorded than has been hitherto to the case, elaborating all the relevant factors in establishing liability in the interest of achieving a consistent, fair overall system; however, more attention also needs to be paid to the *interplay* of these factors. Innovative ideas as regards the interplay of several liability factors can certainly be found in the legal systems, but as yet these have not led to any coherent system. The justification for producers' liability, for example, the idea that advantage and risk should fall to the same party, in combination with the element of – albeit minor – danger posed by defects and the existence of a risk community, should be called to mind; this seems to be an approach worthy of being generalised. In France, the strict liability of parents for the damage caused by their children is based on the somewhat increased danger posed by children as well but also on the inexpensive insurability of this liability risk.

X. The contributory responsibility of the victim

A. Comparative review

8/285 It is generally accepted today that the contributory fault of the victim leads to an *apportionment* of the damage[580]. In the USA, the long-standing adherence to the rule that contributory fault meant the victim lost the entire claim to compensation still exerts its influence today in that it apparently still applies if the victim »is more than 50 % at fault«[581]. However, it is not entirely clear what this means since both tortfeasor and victim are at fault in this case and there is not simply a certain percentage of fault; furthermore, as both of them have set a conditio sine qua non for the entire damage, it is also not possible from a causation perspective to divide up the causality by percent. This probably means, as in German law which takes as its premise the likewise indeterminable predominant causation, that the overall weight of the grounds for imputation, ie in particular the gravity of the fault and adequacy, are material[582].

580 See *Askeland,* Norway no 2/113 ff; *Ludwichowska-Redo,* Poland no 3/140; *Menyhárd,* Hungary no 4/155 ff; *Oliphant,* England and the Commonwealth no 5/139; *Yamamoto,* Japan no 7/807 ff (with a description of the sometimes very idiosyncratic constructions of how contributory fault is taken into account). See further on a broader comparative law basis *Magnus/Martín-Casals,* Comparative Conclusions, in: Magnus/Martín-Casals (eds), Unification of Tort Law: Contributory Negligence (2004) 259 f.

581 *Green/Cardi,* USA no 6/167.

582 Cf *Askeland,* Norway no 2/116; *Ludwichowska-Redo,* Poland nos 3/140 and 143; *Menyhárd,* Hungary no 4/155 ff.

8/286 It is sometimes clearly recognised that as a rule the contributory fault of the victim has a different quality than the fault of the injuring party since the victim usually does *not* act *wrongfully*[583] in being negligent as regards his own interests[584]. Likewise, it is also recognised that not only the fault of the victim but also other factors that can trigger liability when others suffer damage must be taken into account, for instance the dangerousness of things[585] or special risks within someone's own sphere (for example predispositions that lead to a greater risk of injury[586]).

8/287 While there is hardly any deeper analysis of the fundamental problems connected with contributory responsibility[587], in particular in connection with the principle of casum sentit dominus and the fact that the victim normally has not acted wrongfully in endangering himself[588], nonetheless a certain difference in how the injuring party and the victim are treated can be discerned[589]. The discussion of these basic questions can be of import in those legal systems where there is only limited imputation of auxiliaries' conduct: as the risk is in the victim's sphere, much can be said for the argument that he can be held accountable for all misconduct by the auxiliaries he has deployed when they carry out the activities he had engaged them to do and the narrow limits for the imputation of auxiliaries' behaviour in the case of damage to third parties cannot be drawn here[590].

8/288 Worthy of note is the accepted difference in some legal systems between injuries to the highest-ranking goods (life and health) and other goods (eg property): in the interest of protecting the victim, no or only minor reductions to the compensation claim is recognised in the case of bodily injuries[591]. This is particularly surprising when – as in Norway – personal injury is largely covered by social security law anyway and thus there is in fact a far reduced need to protect the victim in this respect.

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583 It is the result of a misunderstanding if in the US report no 6/169 the interpretation is that Basic Questions I, no 6/204 contends that the contributory responsibility of the victim requires that his conduct also renders him liable vis-à-vis third parties. The point cited was intended to explain that the careless behaviour of the victim must be of such nature that, if it was engaged in vis-à-vis third parties' interests, it would trigger liability.

584 See *Askeland,* Norway no 2/114; *Green/Cardi,* USA no 6/171 f; *Yamamoto,* Japan no 7/813 ff. Apparently different in England *(Oliphant,* England and the Commonwealth no 5/139 f).

585 *Askeland,* Norway no 2/114.

586 See on the Japanese discussion *Yamamoto,* Japan no 7/840.

587 See Basic Questions I, no 6/204 ff.

588 See, however, *Ludwichowska-Redo,* Poland nos 3/140 and 143; *Menyhárd,* Hungary no 4/155.

589 *Askeland,* Norway nos 2/114 and 117; *Yamamoto,* Japan no 7/813 ff.

590 See Basic Questions I, no 6/221 ff. On relevant considerations, see *Askeland,* Norway no 2/122 f and *Menyhárd,* Hungary no 4/156. In Poland, on the other hand, damage is imputed like when there is damage to third parties: *Ludwichowska-Redo,* Poland no 3/145.

591 *Askeland,* Norway no 2/124.

B. Conclusions

8/289 Due to a lack of clarity as regards the basic questions, there are still very considerable differences despite fundamental consensus. Debate is needed above all on the fact that the behaviour of the victim is generally *not wrongful* and on the role that the casum sentit dominus principle plays. This question is particularly important as regards the imputation of *auxiliaries'* conduct or of particular sources of danger within the sphere of the victim. Clarification is also needed as regards the relationship between liability based on dangerousness, on the one hand, and contributory fault, on the other. In Basic Questions I (no 6/210 ff) I described in more detail my own view, which takes into account the principle that everyone must bear the risks of his own sphere himself.

Part 7 Limitation of liability

I. Comparative law review

8/290 Imputation of all damage that is caused in the sense of the conditio sine qua non formula or the but-for test is considered too far-ranging in all legal systems[592] – even in France albeit with a certain amount of reticence[593] – both in respect of fault and strict liability[594], and thus *additional criteria based on value judgements* are applied. These are often integrated in a rather confusing manner into the examination of causation[595], though sometimes at least the terms »legal« or »normative« causation are used in order to draw the distinction with »natural« causation. In some legal systems – in a similar fashion to the German legal family – the adequacy criterion is applied[596]; in some this is done separately[597] or is somewhat intermingled[598] with the aspect of the protective purpose of the infringed rule of conduct, which is nothing other than the result of teleological interpretation. In the common law, courts often examine whether the damage is too »remote«, which is largely equivalent to the adequacy test[599], though the »harm-within-the-risk rule« is also drawn on and corresponds largely to the notion of protective purpose[600].

592 Very clear: *Green/Cardi,* USA no 6/173 ff; *Yamamoto,* Japan no 7/291 ff; cf also *Menyhárd,* Hungary no 4/158 f. See further the Preliminary observations and the country reports in *Spier* (ed), The Limits of Liability. Keeping the Floodgates Shut (1996); as well as in *Spier* (ed), The Limits of Expanding Liability: Eight Fundamental Cases in a Comparative Perspective (1998).

593 See *Moréteau,* France no 1/189 ff; *Quézel-Ambrunaz,* Fault, Damage and the Equivalence Principle in French Law, JETL 2012, 24 ff.

594 See *Ludwichowska-Redo,* Poland no 3/150.

595 See *Moréteau,* France no 1/189; *Ludwichowska-Redo,* Poland no 3/148; *Oliphant,* England and the Commonwealth no 5/144.

596 *Askeland,* Norway no 2/126; in Hungary *(Menyhárd,* Hungary nos 4/161 and 165) foreseeability is used but, on the other hand, the meaninglessness of the adequacy theory is highlighted.

597 *Ludwichowska-Redo,* Poland no 3/151; *Zmij,* Wrongfulness as a liability's prerequisite in Art. 415 Polish Civil Code, in: Heiderhoff/Zmij (eds), Tort Law in Poland, Germany and Europe (2009) 20 ff. *Oliphant,* England and the Commonwealth no 5/147 ff. This criterion does not seem to be used in Hungary; see *Menyhárd,* Hungary no 4/165.

598 Thus, in *Askeland,* Norway no 2/128. See further *Yamamoto,* Japan no 7/703 ff.

599 *Oliphant,* England and the Commonwealth no 5/142.

600 *Green/Cardi,* USA no 6/182. *Hamer,* »Factual causation« and »scope of liability«: What's the difference? Modern Law Review 77 (2014) 155. Similar in part in Japan, see *Yamamoto,* Japan no 7/703.

While adequacy is predominantly based on the foreseeability of the damage[601] and on the »normality of the damage« in Poland[602], additional criteria are often also applied. Thus, in Norway[603] the courts examine whether the damage is sufficiently closely linked with the legally protected interests of the claimant, which can be particularly important regarding damage to third parties. **8/291**

It is also worthy of note that the boundary of imputability is understood as being elastic and can be extended in the case of very grave grounds for liability, such as intention[604]. **8/292**

It is still common to speak of an *interruption of the causal link*[605], but increasingly it is being recognised that this is a value judgement on the limitation of imputation and is not a causation problem[606]. In fact this often concerns cases in which there is an intervening, unprovoked, act by a third party[607]. **8/293**

Limits on the amount of liability are not very common outside of the German legal family[608]. In the USA[609] they are, however, increasingly being recognised when this seems necessary considering the expense involved in liability insurance; this is true in particular for non-pecuniary damage in cases of medical liability. Nonetheless, it has not yet been possible to prove whether this is an effective way to reduce the costs of insurance. **8/294**

Therefore, it is possible to *summarise* the situation by noting that, in the context of limiting the imputation of damage, there is in fact wide-ranging consensus, but that there are terminological and systematic differences that make communi- **8/295**

601 Basic Questions I, no 7/7 refers to the basic notion of controllability of the risk, which is stressed in particular by *Larenz,* and which does not apply if the danger is very remote and atypical so that no perpetrator would have been prompted to adapt his conduct with it in mind. In the US report, it is inferred *(Green/Cardi,* USA no 6/181) that a person who keeps a weapon carelessly and as a result it ends up in the hands of unauthorised persons, is not liable for the damage which the unauthorised users cause with it because the shots were no longer controllable by the owner of the weapon once it was removed from his possession. However, this is obviously a misunderstanding of the adequacy theory: naturally the crux is not whether the owner could prevent the shot but that he could have prevented the unauthorised use in the first place and the clearly foreseeably dangerous situation that resulted by not storing the weapon carefully.

602 *Ludwichowska-Redo,* Poland no 3/149. This is also taken as a basis, inter alia, by *Menyhárd,* Hungary no 4/163.

603 *Askeland,* Norway no 2/129.

604 *Moréteau,* France no 1/191; *Askeland,* Norway no 2/130; *Menyhárd,* Hungary no 4/159; *Oliphant,* England and the Commonwealth no 5/145; see further *van Dam,* Tort Law² 308 with additional references.

605 *Moréteau,* France no 1/190.

606 *Ludwichowska-Redo,* Poland no 3/147; *Menyhárd,* Hungary no 4/160 ff; *Green/Cardi,* USA no 6/180.

607 On this *Ludwichowska-Redo,* Poland no 3/154; *Green/Cardi,* USA no 6/188 ff; cf also *Hamer,* Modern Law Review 77 (2014) 167 ff.

608 For instance none are provided for in Poland *(Ludwichowska-Redo,* Poland no 3/156); similarly in Hungary *(Menyhárd,* Hungary no 4/176).

609 *Green/Cardi,* USA no 6/194 f.

cation difficult. It should, however, be possible to eliminate these obstacles without undue difficulty and achieve consensus on the main issues.

II. The special problem of lawful alternative conduct

8/296 One area where the protective purpose theory comes into play is the special problem of lawful alternative conduct. In Basic Questions I no 7/22, some well known examples are mentioned in illustrating the problem: a car driver overtakes a cyclist leaving too little space as he does so and crashes into him, but the same damage would have occurred had he allowed enough space as the cyclist was drunk and did not keep to his side of the road, instead lurching out far into the middle. Very often debate turns on situations where a doctor operates (without medical malpractice) on a patient without adequately informing him of the risks involved, but disadvantageous consequences ensue and the doctor defends himself against the patient's compensation claim by saying the patient would have consented to the procedure in any case had he been properly informed and the same negative results would have ensued. A case where a trade union started a strike without observing the stipulated waiting period of five days intended for negotiations attracted a great deal of attention in Germany; the union's defence against the compensation claims was that the negotiations would certainly have failed. A further example is where a police officer kept a suspect in detention following arrest without permission to extend the suspect's detention; in the proceedings for state liability the state's defence was that the competent judge would have ordered the arrest in any case.

8/297 It is only rarely recognised that this concerns problems related to the *protective purpose* or the connection between the wrongfulness and the result, ie what is known in common law as legal causation[610]; the cases are usually handled as a problem of natural causation[611]. Addressing the hypothetical case of the driver overtaking a cyclist, *Green/Cardi* see »no difficulty with resolving that case on the grounds of factual cause. To ask the counter-factual inquiry required for factual case – would the outcome be different if the tortious conduct had not occurred? – the answer is plainly no. Since the tortious conduct was leaving insufficient space and since even if the driver had left sufficient space the same harm would have occurred, the driver's tort is not a factual cause of the harm. Thus, the driver is not liable because factual cause is absent – it would have happened anyway.« However, this result is startling: the cyclist suddenly lies seriously injured on the street

610 Thus, for example, rightly *Ludwichowska-Redo,* Poland no 3/153 f.
611 *Askeland,* Norway no 2/134; *Green/Cardi,* USA no 6/184 ff.

without any cause! It seems far more logical to say that the motorist, by knocking down the cyclist, created the *factual cause* of the injuries both in the sense of the conditio sine qua non formula and in the sense of the but-for test: he factually knocked down the cyclist. Moreover: if the motorist – as would likewise have been a very possible option – had either not overtaken or done so leaving even more space than is required under the traffic regulations, or done so very slowly, the damage would not have occurred.

8/298 The surprising conclusion that the actual knocking down of the cyclist is not a cause of his injuries is arrived at because, in terms of causation, *Green/Cardi* examine not only whether the defendant's conduct actually led to the damage but also combine this with an examination of wrongfulness in that they compare the actual wrongful behaviour with one particular lawful alternative course of conduct. Specifically, they emphasise: »Necessary for any factual causal inquiry is a counter-factual hypothetical inquiry: what would have happened in the world if the defendant had not engaged in the tortious conduct?« Thus, ultimately it is only examined whether the knocking down is connected with the wrongfulness of the actual conduct. However, this actually makes it clear that in fact there is no fundamental departure from the view that this is a question of the *connection between the wrongfulness* and the result; there is simply a different conceptual framework and terminology. To pin down the true problem and the diversity of issues, it would, however, certainly be helpful if it were also terminologically clarified that the issue here is the connection between result and wrongfulness – and thus the purpose of the rule – and not factual causation; if possible, different prerequisites for liability should also be accurately distinguished.

8/299 This aim is supported by countries within the German legal family; when causation is being examined in terms of »natural« causation, on the basis of the conditio sine qua non formula, only the active conduct under discussion is *imagined away,* without any other hypothetical event being imagined in its stead[612]: if the driver's overtaking is imagined away – without imagining other conduct instead – the cyclist would not have been knocked down.

8/300 However, *Green/Cardi* have given me very valuable food for thought with their line of argument as regards reconsidering the causation question once again. Thus, I have asked whether it is right and proper simply to imagine away the event at issue, as is usual in the German legal family and beyond[613], without imagining another event instead. An argument against this would seem to be that, when examining causation, the actual event must be compared with a *hypothetical* event, the question being whether this hypothetical event would have led to the damage

612 See Basic Questions I, nos 5/60 and 7/24 on this and on the following point.

613 See *Zimmermann,* Comparative Report, in: Winiger/Koziol/Koch/Zimmermann (eds), Digest of European Tort Law I: Essential Cases on Natural Causation (2007) 29/3 no 2 on this.

at issue or not. In respect of this hypothetical occurrence, it must be remembered that, if one event had not happened, this would probably not have been the end of it but instead another event could have taken place. In our example, the driver could have driven past leaving the legally required space or even more space; he could have reduced his speed so much that the cyclist was no longer in danger; he could have warned the cyclist and told him to stop or he could have waited before driving on so that the cyclist would already have been on a safe part of the road by the time he was overtaken. However, it is not possible to determine accurately how events would otherwise have turned out. It certainly seems problematic that *Green/Cardi* draw just on one particular course of conduct, namely driving past and leaving the legally required amount of space, as the one and only fixed hypothetical possibility when examining causation, although there are almost innumerable variations conceivable[614]. Of these imaginable hypothetical happenings, some would also have led to the same damage, others to less damage and others again would not have caused any damage. Given this rich diversity of alternatives, surely not only precisely the one hypothetical course of conduct that is most favourable for the defendant – because it would negate causation – should be picked out and taken as a premise. It would be equally conceivable for the driver to have overtaken the cyclist but to have left even less space in so doing; this course would not lead to any relief from liability for the defendant. Rather it must be questioned whether it is decisive that the cyclist's injury was avoidable in the abstract, ie the damage did not necessarily have to occur one way or the other. Hence, imagining all conceivable, hypothetical scenarios could possibly only be relevant insofar as causation is negated if *all* other variations would also have led to the same damage, ie this damage was *unavoidable.* Then, and only then, would the liability of the defendant not come into question because the damage would not even have been avoidable in an abstract sense and thus, it would no longer be justifiable to impute it to the driver[615]. As the imputation of damage is material, depending on whether the defendant could have avoided the damage, it must be sufficient for determining causation and thus imputation of the damage that other alternatives that would not have led to the same damage were theoretically possible, ie the damage was avoidable. Proceeding from this premise, it is also logical that no one particular, more or less random, other course of conduct can be picked out as the relevant hypothetical event for the comparison and as decisive for the determination of whether the damage would have been sustained in any case. On the other hand, it must be noted that, when evaluating any specific conduct, causation cannot be negated simply because it is conceivable that another, purely hypothetical

614 See also *Hamer,* Modern Law Review 77 (2014) 168 f.

615 See *F. Bydlinski,* Causation as a Legal Phenomenon, in: Tichý (ed), Causation in Law (2007) 8 f, 14 ff; see further Basic Questions I, no 5/58.

event would have led to the same damage: if this were the decisive point, imputation of active conduct would practically never be possible because it would always be possible to imagine other events that could have led to the damage at the same time or in the near or distant future. In our example, it would also be possible to conceive of a hypothetical occurrence – as already described – where the defendant drives even more closely to the cyclist or the very next motorist behind him knocks the drunken cyclist down and the same damage would have resulted. If the prerequisite of natural causation is to remain manageable, such, purely theoretical, infinitely variable hypotheses must be considered irrelevant and only real happenings can be decisive[616]. Thus, we can observe as follows: the *real trigger* of the damage combined with the finding that bringing about said damage was *avoidable,* as can be determined by imagining away the conduct of the defendant, is material. Purely theoretical, hypothetical events cannot lead to a negation of natural causation in respect of an event that actually brought about avoidable damage; a purely imaginary, hypothetical course of conduct cannot serve to determine what actually happened[617]. All other considerations regarding limitations of imputation based on value judgements no longer fall within the scope of natural causation, but belong to other imputation instruments. Therefore, the cases of lawful alternative conduct do not constitute a problem of natural causation but of another imputation criterion with the underlying value judgement deriving from the protective purpose of the infringed rule, ie in common law so-called legal causation.

8/301 The considerations inspired by *Green/Cardi* have led me to change my view on *omissions,* albeit in the opposite direction to the one argued by *Green/Cardi:* up until now I had argued – as do *Green/Cardi* – that, in the case of omissions, the defence of lawful alternative conduct leads to a rejection of liability for reasons of natural causation. I started from the premise[618] that an omission can only be causal if taking a certain action would have prevented the occurrence of the damaging result and provided this action would have been possible. I inferred from this – in line with widespread opinion – that, in the case of omissions, liability must indeed be negated due to lack of causation »if the same harm would also have arisen had he taken action in accordance with his duties«. However, in fact

616 This is also the difference – to be emphasised more strongly than before, see Basic Questions I, nos 7/23 and 29 f – to the cases of hypothetical causation in which later, real events are always at issue, so that there is certainty as to which events are to be examined. In the cases of lawful alternative conduct, on the other hand, purely hypothetical events that never actually happened are under discussion, so that it is not even certain which event would otherwise have occurred instead.

617 Thus, *Koziol,* Wegdenken und Hinzudenken bei der Kausalitätsprüfung, Österreichisches Recht der Wirtschaft (RdW) 2007, 12 f.

618 Basic Questions I, no 7/24; likewise in RdW 2007, 13.

it would be more correct even in the case of omissions – analogous to the above arguments – if a sharper distinction was drawn between the causation and the wrongfulness issues: if it would have been possible to prevent the damage by taking some action, the omission of this action was causal for the damage, even if the same damage would have ensued in the case of lawful conduct – ie if the rescue measure had been undertaken in line with duties. The question of whether the omission contravened duties and if conduct in line with such duties would have been suitable to prevent the occurrence of the damage is once again a question of wrongfulness and the connection between result and wrongfulness and does not concern so-called natural causation.

8/302 *Green/Cardi* have thus brought me to the realisation that in the context of the problem of lawful alternative conduct, in relation to both active conduct and omissions, the issue cannot normally turn on release from liability due to lack of natural causation, as such causation must usually be affirmed, but instead liability can solely be excluded on other grounds with underlying value judgements. As already described[619], the issue basically concerns wrongfulness and the connection between result and wrongfulness or – more broadly formulated – the *protective purpose of the infringed rule.* There is also a substantial advantage to this in comparison with the approach based on natural causation in that a more elastic criterion is available.

8/303 The prevailing view[620], that the defence of possible lawful alternative conduct is material and leads to a complete *release from liability* for the injuring party, is still quite right in many cases even when we take this approach: if certain conduct is forbidden by the legal system, this is ordinarily with the aim of preventing damage which would otherwise be likely. This goal of preventing damage cannot, however, be accomplished if the same damage can and is allowed to arise anyway due to lawful behaviour. Therefore, it must be concluded that such damage cannot fall within the protective scope of the infringed conduct rule since the legal system does actually allow such damage to occur.

8/304 *Moréteau*[621] reports, however, of contrasting decisions, which reject any release from liability and argues this by noting: »the explanation that the rule is not so much aimed at preventing damage but instead at excluding certain types of behaviour makes sense«. Very much in line with this, *Ludwichowska-Redo*[622] also addresses rules that are directed at preventing the infliction of damage in a certain way or by certain conduct. This is well in line with the view common within the

619 Basic Questions I, no 7/24.
620 On this and the following, see Basic Questions I, no 7/25 f with additional information.
621 *Moréteau,* France no 1/194.
622 *Ludwichowska-Redo,* Poland no 3/152.

German legal family[623] that invoking lawful alternative conduct does not lead to a release from liability if the conduct rule was not so much aimed at preventing damage but above all at excluding *types of conduct* or at bringing about compliance with *certain courses of conduct.* If account should be taken here too of the defence of lawful alternative conduct, it is argued, this would mean that anyone would be able to circumvent the legal path stipulated by the legal system, which may for instance include certain safeguards, or – in particular as in the case of medical interventions – the victim's own, informed decision. This argument places the deterrent function firmly in the foreground.

8/305 There is often resistance when in cases like this it is decided not to allow the release from liability on the basis of the defence of lawful alternative conduct and to award the victim full compensation for the harm which really ensued; however, this resistance still derives from causation considerations. *Green/Cardi* and *Moréteau* point out, for instance, that in the medical liability example the injury to health is not caused by the inadequate information given to the patient if such would have decided to have the operation even had he been adequately informed and accordingly, the damage would have ensued one way or another. A similar argument is made where the claimant is detained by a police officer without a warrant to extend detention but would have been detained anyway. Therefore, some of the original examples will be discussed in the following lines on the basis of new considerations and counter-arguments.

8/306 In the case of the *cyclist* there were certainly alternative forms of conduct possible that would have led to an avoidance of the injury to the cyclist; therefore, pursuant to the considerations above, it can be assumed that the motorist caused the damage. There are, however, no grounds for departing from the general consideration that the damage which actually occurred does not lie within the protective scope of the infringed rule of conduct,if it could also have ensued in the case of lawful conduct anyway.

8/307 In the case of *medical liability,* there must be better distinction than has existed up to now between the infringement of the duty to inform and carrying out the operation inadmissibly due to a lack of sufficient information. The damage which occurred during the course of the operation without any malpractice by the doctor and which thus could be deemed a chance event in this particular respect is always in the foreground of the discussion. It is undisputed, however, that the doctor caused the damage if the patient would have decided against the operation had he been fully informed and thus the consequential damage would not have occurred; on the basis of the wrongfulness of the procedure without effective consent, there is no doubt in this case about the liability of the doctor. The difficul-

623 See the information in Basic Questions I, no 7/26.

ties begin, however, when the patient would also have decided in favour of the operation had he been properly informed, as in this case the consequential damage would also have occurred. In the light of the above discussion, it may be assumed that the operating surgeon also caused the coincidentally negative results by carrying out the – inadmissible – operation. Furthermore, it can once again be assumed that the legal systems do not aim at sanctioning actions that do not lead to any increase of risk as compared to lawful conduct. Accordingly, the inadmissibility of the operation should not trigger full liability for the coincidentally negative results[624] in the light of the protective purpose consideration if the patient would have been exposed to the same risk had the operation been carried out admissibly.

8/308 Nonetheless, it must be remembered in the context of medical liability cases that the failure to inform the patient fully or accurately also infringes the right to – informed – *self-determination.* Accordingly, in France[625], the notion that above all a certain type of conduct should be prevented by the infringed rule is emphasised in cases of inadequate information by doctors and thus, in any case – ie even if the patient would have consented to the procedure had he been informed properly and therefore would also have sustained the damage to his health – non-pecuniary damages are recoverable; this approach takes as its premise the infringement of the personality right to self-determination after obtaining a sufficient basis for such consent. *Green/Cardi*[626] also agree that one should take infringement of self-determination as the premise and compensate the damage caused by this[627]. This damage is, however, very different from the impairment of health, namely non-pecuniary harm caused by the infringement of the right to self-determination. This seems to be a persuasive approach, but it remains to be examined whether the breach of the duty to inform could not also trigger liability for the negative results of the operation – though in this precise respect there is no fault. It must, however, also be borne in mind that firstly if the patient would have opted for the operation, there would thus have been the same random risk of a negative nature. Furthermore, it must be taken into account that the requirement of consent based on sufficient information does not aim at the avoidance of additional risks; such risks can undoubtedly be better assessed by the surgeon rather than by the patient. The requirement to obtain consent as serving instead to preserve the right to self-determination and thus also as facilitating the decision to take or not to take a certain

624 On the specific question of whether damage apportionment would be appropriate see Basic Questions I, no 7/29 ff. This issue will not be entered into in any further detail here.

625 *Moréteau,* France no 1/194.

626 *Green/Cardi,* USA no 6/186.

627 *Karner,* Der Ersatz ideeller Schäden bei Körperverletzung (1999) 108 ff, 119 ff, emphasised the distinction between the *Integritätsinteresse* (which serves to protect the legal goods of one's contractual partner) and the interest in relying on information (with the resulting consequences of such reliance under the law of damages).

risk. If, however, the patient would have accepted the risk of the operation even had he been fully informed, no additional, undesired risk has been occasioned to him by contravention of the right to self-determination. Therefore, in turn, it can be assumed that the legal system does not aim to provide for full liability[628] if there was no increase in risk due to the wrongful conduct and the patient would have suffered and had to bear the same harm even had he been properly informed. However, as *Green/Cardi* and *Moréteau* point out[629], there is still the damage that occurred precisely because of the infringement of the right to self-determination and which would not have occurred had the patient been properly informed: this is non-pecuniary harm that was caused by the breach of a fundamental personality right. Hence, it is in any case recoverable if the breach of the duty to inform was culpable[630].

Finally, we look at the case of *detention* that is wrongful because there is no **8/309**
court order for its extension. This is a classic example of when the infringed rule of conduct is not so much aimed at preventing the damage but above all at precluding a certain *type of conduct* or securing compliance with a *certain procedure;* therefore, invoking the lawful alternative conduct defence may not lead to any release from liability. The starting point of the considerations must be that, while taking the person into custody was admissible, nevertheless within a certain period of time a court order for the continuation of the detention ought to have been obtained or alternatively the person ought to have been released. The continued detention was avoidable and was factually caused by the authority that carried out the inadmissible detention. In favour of the duty to compensate and not allowing the lawful alternative conduct defence, it can be argued that the legal system has provided for a special procedure in order to safeguard the interests of the detainee and failure to comply with this procedure certainly increases the risk of inadmissible detention, ie a very substantial harm. Even if it is established that the court would have allowed the continued detention because all the legal prerequisites were fulfilled, it is nonetheless more appropriate to consider that the legal system did not aim at avoiding the detention in itself but only at avoiding prolonged detention without a court order and all the negative consequences of not obtaining such court order in good time. Such negative consequences could, for instance, be an extension of the deprivation of liberty or the non-pecuniary damage that arises due to non-compliance with the procedural regulations in respect of suspects. Any loss of earnings, however, which would also have ensued had there been a court

628 As already mentioned above, there will be no more detailed discussion here of the further question of whether apportionment of damage would be appropriate in the circumstances – see on this Basic Questions I, no 7/29 ff.

629 *Green/Cardi,* USA no 6/186; *Moréteau,* France no 1/194.

630 Thus, also already *Karner,* Ideelle Schäden bei Körperverletzung 121 f.

order, do not appear recoverable – at least not in full[631]. Nonetheless, it is undeniable that something can also be said for the view that since the law was aimed at avoiding any and all such non-authorised detention, all harm brought about by such detention is recoverable when the stipulated procedure is not complied with and, accordingly, the detention was wrongful. In this case, however, it would also have to be considered whether the continued detention with a court order that the victim is spared as a result, because it is no longer necessary, is to be set off as an advantage, which ultimately could lead to the same result.

8/310 A frequently discussed aspect in the context of the »lawful alternative conduct« problem is the *difficulties* that the victim would likely encounter in respect of *evidence* if he had to prove the imagined hypothetical course of events. How should, for instance, a patient prove that he would have decided against having the operation had he been properly informed by the doctor and thus not have sustained the damage? Difficulties arise in particular when hypothetical decisions in the past are under discussion, which in many cases cannot be proven. While the approach presented here cannot eliminate the difficulties of proof, it at least means that the burden of proof is imposed largely on the defendant and thus the victim's compensation claim becomes enforceable: if the issue is that the damage lies outside the protective scope of the rule infringed, the defendant must invoke this as his defence against liability and therefore also prove that the damage would also have arisen in the case of lawful alternative conduct. Thus, the defendant has the difficulty of proving the imagined alternative course of events. This approach is supported by *Karollus'* convincing argument that the party who has acted in a wrongful manner that increases a risk, must bear the entire risk of proving this, that means the *burden of proof* lies with him so that he must prove that the increase of risk had no effect in the case at issue[632]. The division of the burden of proof at the expense of the party who acted wrongfully can certainly be justified with reference to penal and deterrence notions: behaviour that is dangerous and also presents difficulties insofar as proof is concerned should indeed be prevented; the risk that it cannot be proved is better borne by the party who generated it by acting wrongfully than by the victim.

631 Once again it must be pointed out that there will be no more detailed discussion here of the further question of whether apportionment of damage would be appropriate in the circumstances – see on this Basic Questions I, no 7/29 ff.

632 *Karollus,* Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992) 399 ff. Agreeing with this, *Moréteau,* France no 1/195.

Part 8 The compensation of the damage

I. Comparative review

As already highlighted above (no 8/29), the law of damages in the Continental European sense cannot be equated with the whole law of torts under common law, but only with those torts that require the occurrence of damage and are directed at *compensating the damage caused.* All other torts, which either do not require the existence of damage or do not provide for compensatory damages, but instead for example for injunctions or penalties are either in terms of prerequisites or legal consequences and thus in regard of their decisive function not comparable with the Continental European laws of damages and therefore are not included here. **8/311**

In respect of the law of damages and the corresponding torts of the common law that serve the function of compensating damage caused, the principle of *full compensation* – but no more[633] – is emphasised everywhere[634]; reference is made to the departure from this in the field of liability based on grounds of equity[635]. PETL (art 10:101) also stress the task of compensation: »to compensate the victim, that is to say, to restore him as far as money can, to the position he would have been in if the wrong complained of had not been committed.« Art VI.–6:101 DCFR uses a similar formulation. **8/312**

In respect of French law, *Moréteau*[636] comes to the conclusion that the principle of full compensation is emphasised but ultimately it is by no means always observed in practice and that the extent of compensation ultimately seems to depend also on the gravity of the grounds for imputation at hand. That there be a connection between the weight of the grounds for imputation and the extent of the compensation would seem absolutely appropriate[637]. It does not seem advisable, however, to make the extent of compensation solely dependant on the degree of fault, as is stipulated in Austria by the Civil Code (ABGB). This meets with increasing criticism even in Austria[638] and is rejected in other countries[639]: taking **8/313**

633 This is emphasised above all with respect to Japanese law: *Yamamoto,* Japan no 7/805.

634 *Moréteau,* France no 1/197; *Askeland,* Norway no 2/138; *Ludwichowska-Redo,* Poland no 3/157; *Menyhárd,* Hungary nos 4/167 and 169; *Oliphant,* England and the Commonwealth no 5/150, *Yamamoto,* Japan nos 7/69 and 806.

635 *Ludwichowska-Redo,* Poland no 3/158. In Japanese law, on the other hand, there is no liability based on grounds of equity, *Yamamoto,* Japan no 7/870.

636 *Moréteau,* France no 1/197 ff.

637 See Basic Questions I, no 8/8.

638 Basic Questions I, no 8/2.

639 *Askeland,* Norway no 2/139.

fault as a sole premise and not the entirety of the grounds for imputation as well as the interests at stake is much too one-sided and rigid. On the other hand, adjusting the compensation on the basis of comprehensive value judgements and a normative assessment of the damage would be appropriate[640].

8/314 In the German legal family, *restitution in kind* has primacy under law; the same applies in Hungary[641]. When it is pointed out that in Poland the victim has the choice, this does not make much practical difference since even in the German legal family it is argued that restitution in kind should serve the interests of the victim and thus such can also seek to have monetary damages instead, unless this would be unreasonably burdensome for the injuring party[642]. Art 10:104 PETL also corresponds to the Polish model. In French law, restitution in kind is not given any precedence but it is often provided for by the courts[643]. This would seem to correspond to the rule in the DCFR (art VI.–6:101 para 2): the type of compensation to be awarded is that which is appropriate having regard to the circumstances. In English law, restitution in kind is unknown[644], which corresponds to the general tendency also seen in contract law to give the obligee a claim only to money[645]. Apart from the rather astonishing exception of restoration of honour, restitution in kind is not provided for in Japan either[646].

8/315 The concept of *objective damage* is especially defended in Austria[647], but it is also recognised in Polish[648] and in some instances in Japanese[649] law, thus facilitating the determination of the minimum damage caused to the claimant. In English law it seems that objective assessment based on market value is usually applied[650].

8/316 In the case of permanent damage, a one-off *lump-sum payment* is preferred in Norway, England and the USA as well as in Japan, but for special reasons an annuity may be awarded[651]. In Poland, on the other hand, the payment of an annuity is generally stipulated except in the case of non-pecuniary damage[652], and in

640 *Askeland,* Norway no 2/140.
641 *Menyhárd,* Hungary no 4/168.
642 Basic Questions I, no 8/11 ff.
643 *Moréteau,* France no 1/210.
644 *Oliphant,* England and the Commonwealth no 5/150.
645 See *Beale* (ed), Chitty on Contracts[31] (2012) para 27-005.
646 *Yamamoto,* Japan nos 7/95, 763 and 779.
647 Basic Questions I, nos 3/8 ff, 8/10; see further recently on this *Karner,* Fragen der objektiv-abstrakten Schadensberechnung, Fenyves-FS (2013) 189.
648 *Ludwichowska-Redo,* Poland no 3/71.
649 *Yamamoto,* Japan nos 7/260 and 785.
650 *Oliphant,* England and the Commonwealth no 5/151.
651 *Askeland,* Norway no 2/141; *Oliphant,* England and the Commonwealth no 5/154 f; *Green/Cardi,* USA no 6/197 f; *Yamamoto,* Japan no 7/764 ff.
652 *Ludwichowska-Redo,* Poland no 3/161.

Hungary the courts decide on the type of compensation[653], but annuity payments predominate.

The compensation can be *reduced* for very special reasons in Norway and Poland[654], and both PETL (art 10:401) and the DCFR (art VI.–6:202) propose this, whereby above all the financial situation of both sides must be taken into consideration; in France there is increasing support for such a possibility[655]. In England and the USA as well as in Japan, on the other hand, no reduction clause comes into discussion; reference is made to the insolvency rule[656]. **8/317**

II. Conclusions

There is consensus on the essential issue that the responsible injuring party must in principle pay full compensation – no less, but also no more. **8/318**

As far as *restitution in kind* is concerned, the European Group on Tort Law was able to reach agreement to the effect that restitution in kind should in principle be provided for within the framework of an appropriately limited consideration of the interests of the victim (art 10:104 PETL)[657]. This balanced approach could well meet with general agreement. **8/319**

Moréteau[658] points out a special type of damage compensation for non-pecuniary damage in connection with the discussion of the compensation of minor damage. He writes that: »Many victims are looking for opportunities to make impact statements and obtain public recognition that a wrong was suffered. Where there is an infringement to a personality right, such as honour, privacy, or image, many a victim would be content with nominal damage, and the publication of a statement on the media that infringed the right. Reparation is not exclusively a financial matter, especially when it comes to protecting extra-patrimonial rights.« This corresponds to the European Court of Human Rights' judgments declaring *»satisfaction by finding a violation«*[659]. The idea that *a finding of a violation* is in itself **8/320**

653 *Menyhárd,* Hungary no 4/172.

654 *Askeland,* Norway no 2/145 ff; *Ludwichowska-Redo,* Poland no 3/164. *Askeland* interestingly goes into more depth on the relationship between the reduction clause and limitation of imputation with the help of adequacy.

655 *Moréteau,* France nos 1/11 and 212 ff.

656 *Oliphant,* England and the Commonwealth no 5/152; *Green/Cardi,* USA no 6/199 f; *Yamamoto,* Japan no 7/870.

657 See on this *Magnus,* Damages, in: European Group on Tort Law (ed), Principles of European Tort Law: Text and Commentary (2005) 159 f.

658 *Moréteau,* France no 1/169; see also *Menyhárd,* Ungarn no 4/22.

659 On this *Józon,* Satisfaction by Finding a Violation, in: Fenyves/Karner/Koziol/Steiner (eds), Tort Law in the Jurisprudence of the European Court of Human Rights (2011) 741 ff.

just satisfaction has been justified by *Franz Bydlinski*[660] in qualifying such declaratory judgements as a special sort of compensation in kind: »If and insofar as the negative psychological effects of the violation per se are directly concerned, ie the injury to the sense of justice, which is naturally very sensitive when it comes to someone's personal affairs, ›satisfaction‹ in the strictest sense is obtained for the victim in that he is found authoritatively to be in the right, and his opponent to be in the wrong, which must cause positive reactions in the victim to counter the negative upset about the violation or which come as near as possible to so doing.« I think it would be very useful to discuss whether minor non-pecuniary loss should in general be compensated only by finding a violation: on the one hand, the victims receive compensation in kind by such satisfaction, on the other hand, not spending considerable sums for compensation of insignificant non-pecuniary loss would help to compensate significant loss in a more satisfactory way than is done at present and, in addition, to reduce the premiums for liability insurance.

8/321 Ultimately, it should not be too difficult to obtain recognition for the *objective-abstract assessment of damage,* which is championed in implementing the notion of continuation of a right (Rechtsfortwirkungsgedanken), in particular referring to the market value of a thing in order to arrive at the minimum damage to be compensated. The European Group on Tort Law has already taken on this concept after detailed debate (art 10:201 PETL)[661] and thus has also made a contribution towards activating the deterrent function of the law of damage[662].

8/322 It should also be possible to find consensus regarding the flexible provision of periodic payments or *lump-sum compensation* (art 10:102)[663] taking into account the interests of the victim.

8/323 The *reduction clause* met with strong resistance even within the European Group on Tort Law[664] and will probably trigger debate once again at the global level, the outcome of which is impossible to predict. I tried to explain why I believe that precisely the law of damages needs such a flexible possibility for the reduction of the obligation in exceptional cases in Basic Questions I (no 8/24 ff). It only remains to be said that the horror scenarios expressed in the country reports as regards the consideration of the economic capacity to bear the burden certainly have no foundation and, therefore, do not serve objective discussion. This applies

660 Methodological Approaches to the Tort Law of the ECHR, in: Fenyves/Karner/Koziol/Steiner (eds), Jurisprudence of the European Court of Human Rights no 2/257; approving *Koziol,* Concluding Remarks on Compensatory and Non-Compensatory Remedies, in: Fenyves/Karner/Koziol/Steiner, Jurisprudence of the European Court of Human Rights 869 ff.

661 See on this *Magnus* in: EGTL, Principles 161 f.

662 On the deterrent function of the law of damages as a basis for the concept of objective assessment of damage, see Basic Questions I, no 3/8 ff.

663 See on this *Magnus* in: EGTL, Principles 153 f.

664 On art 10:401 see *Moréteau* in: EGTL, Principles 179 f.

in particular in respect of the fear expressed in the US report[665]: »That argument appears to us to be one for unadorned wealth shifting – money provided to those who are poor can help them more than leaving the money with someone wealthier. Such an argument, if accepted, might entitle a victim of a catastrophic loss to seek payment from another even though that individual is not liable in tort for the loss.« The reduction clause clearly does not lead to any foundation for liability that would not otherwise exist due simply to the wealth of the defendant but at most, in rare cases and under careful consideration of the interests worth protecting on both sides, it leads to a reduction of liability that is based on the general rules.

665 *Green/Cardi,* USA no 6/200.

Part 9 Prescription of compensation claims

I. Comparative review

8/324 The national rules on prescription offer a great diversity of different prescription periods. This is not very surprising insofar as it is not possible to weigh up the interests involved exactly when setting such periods; thus, there is a great deal of leeway when it comes to determining prescription periods, which ought to be appropriate in extremely variable life circumstances[666]. Hence, as there are no in-depth questions of conviction to be resolved in this respect, it should hardly be impossible to reach international consensus on certain periods that seem appropriate.

8/325 However, it is certainly possible that even a rough assessment of whether very long or rather shorter periods are necessary is connected in fact with fundamental issues, about which it has not yet been possible to reach any agreement. This kind of connection does indeed exist specifically as regards the very significant (and practical) issue of when the prescription period commences, an issue which has been resolved in many different ways based on very different underlying value judgements, and the duration of the prescription period. The problem of when the prescription period should begin indeed proves to likely be the core issue of prescription under the law of damages. Hence, it will be discussed in more detail and an attempt will be made to arrive at a convincing and thus acceptable resolution by elaborating upon the fundamental considerations at issue.

8/326 The term of *short, subjective prescription periods* is usually linked to the victim's knowledge of the damage and of the identity of the injuring party, so that there are no unanswered questions about when it should commence[667]. As far as *long, objective prescription periods* are concerned, on the other hand, there is no consensus as regards when they begin: sometimes the damaging event is held to be material in this respect, sometimes the occurrence of the damage is taken as the premise[668]. If the prescription period begins to run from the moment of the

666 This is rightly emphasised by the Hungarian report *(Menyhárd,* Hungary no 4/182). Indications for the proper duration of the period are attempted from an economic analysis of law perspective, see *Gilead,* Economic Analysis of Prescription in Tort Law, in: Koziol/B.C. Steininger (eds), European Tort Law 2007 (2008) 112 ff.

667 See *Ludwichowska-Redo,* Poland no 3/165 ff; *Yamamoto,* Japan nos 7/872 ff and 888 ff; further *Zimmermann,* Comparative Foundations of a European Law of Set-Off and Prescription (2002) 92 f, 96 ff.

668 See Basic Questions I, no 9/16 ff for the position on the German legal family; on Japanese law *Yamamoto,* Japan no 7/931 ff. A broad, comparative law overview is offered, for example, by *Zimmermann,* Comparative Foundations of a European Law of Set-Off and Prescription;

damaging event, it may occur – in particular when it comes to the effects of radiation, chemicals or germs – that the prescription period ends before the damage occurs and the victim has absolutely no chance of obtaining compensation for the damage that has only just occurred.

8/327 The problem clearly posed in such cases was addressed in several of the country reports[669]; the value judgements applied and approaches taken toward a solution vary greatly, however. The Hungarian report dwells firstly on one question of principles: it rightly points out the conflict between the fundamental rights protection of property and the prescription of claims[670]. In considering this aspect, it seems natural that Hungary has sufficient regard to the rights of the victim. Accordingly, the prescription period can never start in Hungary before the damage has occurred as prior to this no claim can fall due; therefore, the victim is always guaranteed the possibility of asserting his compensation claim, even when the harm only emerges after a long time. For the same reasons, this start of the prescription period is also adhered to even in the case of foreseeable future damage. French law also takes as its premise for prescription the inactivity of the victim and accordingly stipulates that the damage must already have occurred for the prescription period to commence so that it is possible for the compensation claim to be asserted. In the case of physical injury it even goes one step further and requires the »consolidation«, ie the completion of the damage[671].

8/328 Besides a short prescription period that starts to run once the victim knows of the damage and the identity of the injuring party, Polish law[672] recognises a long prescription period that runs from the »occurrence of the damaging event«. This phrase is understood as meaning that the damaging event and not the occurrence of the damage is decisive for the commencement of the prescription period[673]; this is the case even though the general provisions expressly state that the prescription period only begins to run on the day that the claim arises. The Polish Constitutional Court[674] understandably decided that the provision contravened the Constitution as it robbed the victim of any compensation claim. The legislator implemented this finding to an extent in a supplementary provision introduced in 2007,

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Zimmermann/Kleinschmidt, Prescription: General Framework and Special Problems Concerning Damages Claims, in: Koziol/B.C. Steininger (eds), European Tort Law 2007 (2008) 37; *Zimmermann/Kleinschmidt,* Verjährung: Grundgedanken und Besonderheiten bei Ansprüchen auf Schadensersatz, Bucher-FS (2009) 861.

669 See, for example, *Yamamoto,* Japan no 7/931 ff.

670 *Menyhárd,* Hungary no 4/177 f.

671 On all this *Moréteau,* France no 1/216 ff; *Moréteau,* France, in: Koziol/B.C. Steininger (eds), European Tort Law 2008 (2009) 264 ff.

672 *Ludwichowska-Redo,* Poland no 3/164 ff.

673 Judgment of the Supreme Court of Poland (SN) of 17. 2. 2006, III CZP 84/05, published in Koziol/B.C. Steininger (eds), European Tort Law 2006 (2008) 389 f.

674 TK of 1. 9. 2006, SK 14/05, published in Koziol/Steininger (eds), European Tort Law 2006, 390 ff.

according to which the prescription period does not expire any earlier than three years after the victim knew of the damage and the identity of the injuring party in the case of physical injury[675].

8/329 English law also deems the occurrence of the damage a necessary prerequisite for the prescription period to start running if the claim requires proven damage; only in the case of those »torts« which do not require damage to have occurred, for example trespass, is the delictual conduct material[676]. Likewise in the USA[677], it is maintained that the prescription period can only start to run when the claim has arisen, which in turn requires that the damage has occurred. It is true that besides the »statutes of limitation« there are some »statutes on repose«[678], which time the expiry of the period from a certain event, for instance placing a product on the market, without taking account of when the damage occurs. However, criticism is currently being levelled precisely against this. For instance, Judge Frank contended in his »dissenting opinion« in *Dincher v. Marlin Firearms Co*[679] that: »Except in topsy-turvy land you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal ›axiom‹, that a statute of limitations does not begin to run against a cause of action before that cause of action exists, ie, before a judicial remedy is available to the plaintiff.«

8/330 It must be remembered[680] that § 1478 of the Austrian Civil Code (ABGB) highlights as a prerequisite for the commencement of the prescription period that it would already have been possible to exercise the right. This principle must mean that prescription of compensation claims can only begin with the *occurrence of* the victim's *damage:* before the damage occurs, the compensation claim has not yet arisen and thus, it cannot be asserted. This consequence is also usually recognised in respect of the long period of prescription; some of the literature on this point and the case law, however, disregard this fundamental rule and take the view that the long prescription period already starts to run as soon as the action giving rise to liability is committed. In Japan[681], by contrast, the occurrence of the damage is held to be material despite a statutory rule which takes the date of the unauthorised action as the starting point.

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675 See *Bagińska* in: Koziol/Steininger (eds), European Tort Law 2007, 451.
676 *Oliphant,* England and the Commonwealth no 5/156.
677 *Green/Cardi,* USA no 6/204; see further *Dobbs/Hayden/Bublik,* The Law of Torts I² (2011) § 242.
678 *Green/Cardi,* USA no 6/206; *Dobbs/Hayden/Bublik,* The Law of Torts I² § 244.
679 198 Federal Reporter, Second Series (F.2d) 821, 823 (2d Cir. 1952) (Frank, J, dissenting); this decision is referred to in *Dobbs/Hayden/Bublik,* The Law of Torts I² § 244 FN 28.
680 See Basic Questions I, no 9/16.
681 See, for example, *Yamamoto,* Japan no 7/933.

In noteworthy contrast to all of the numerous and also weighty opinions to the contrary, § 199 para 2 and para 3 no 2 of the German Civil Code (BGB) expressly stipulate that the absolute period of 30 years for the prescription of compensation claims begins without any consideration of when the claim arises. The period is triggered by the *action committed,* the breach of duty or whatever other event gave rise to the damage; ie even before the occurrence of the damage[682]. Likewise, Swiss law takes as the commencement of the absolute 10-year period the date of the damaging action and not the occurrence of the damage[683]. **8/331**

In Germany, constitutional concerns have been raised about the possibility of prescription before a claim even arises[684]. On the other hand, however, *Zimmermann* defends the irrelevance of the occurrence of the damage and the damaging event as the material point in time in his investigations. The provision is based on extensive, comparative law investigations and also the interplay of social security law and the law of damages. He has even proposed – following the line taken by the Principles of European Contract Law – that the short prescription period should also take the damaging event as its starting point and that the impossibility of detecting the damage should only be recognised as a ground for suspending the prescription period. This would ensure a very homogenous law on prescription created in order to eliminate the problems of having two independent prescription periods with different starting points and their own terms. **8/332**

This is certainly a tempting solution. Nonetheless, I consider that it is necessary to return to the discussion of the fundamental underlying values before reaching any final decision, since these values have slipped somewhat into the background in my opinion. **8/333**

II. Conclusions[685]

As was already pointed out in Basic Questions I (no 9/1), it must be taken as a premise that the loss of an existing right simply because of the expiry of time, or at least the fact that such is rendered unenforceable, is a serious impairment of the protection of well-founded rights, the principle of freedom and the theory of justice[686]. Due to this loss of pecuniary assets against the will of the person previ- **8/334**

682 On this see Basic Questions I, no 9/18; *Grothe* in MünchKomm, BGB I[6] (2012) § 199 no 46.
683 Basic Questions I, no 9/19.
684 *Grothe* in MünchKomm, BGB I[6] Vor § 194 no 9.
685 The following considerations have largely been published in my contribution »Der Beginn schadenersatzrechtlicher Verjährungsfristen«, Egon Lorenz-FS (2014) 653.
686 *F. Bydlinski,* System und Prinzipien des Privatrechts (Reprint 2013) 167 f.

ously entitled, prescription is often referred to as a type of *dispossession*[687]*;* this is compounded by the fact that dispossession must serve »the general best interest« (explicitly stated in § 365 of the Austrian Civil Code, ABGB), whereas prescription benefits one specific obligee without any set-off and does not serve the public interest[688]. Hence, proceeding solely on these basic principles, the institution of prescription would have to be considered – as *F. Bydlinski*[689] emphasises – a *violation of legal ethics.* However, the fact that the institution of prescription on the basis of a victim having had a relatively long time to assert a claim has enjoyed most solid recognition everywhere at all times can be explained by reference to other basic principles, specifically the requirement of *legal certainty* in general[690] as well as *practicability* and *economic effectivity*[691].

8/335 As *B.A. Koch*[692] rightly explains, in principle any claim, once it has arisen, may only be prescribed when outweighed by other interests. The decision as to when prescription should apply hinges, as *Zimmermann*[693] stresses, on the delicate *balancing of countervailing interests;* the dispossession type effect of prescription can only be justified »if, as a rule, the creditor has had a fair chance of pursuing that claim«[694]. Besides the interests of the defendant, in particular in being protected against increasing evidentiary difficulties, unexpected suits and security as to what he disposes of, the interests of the general public in timely enforcement of rights, peace under law, legal certainty and ensuring that the courts are not overburdened by evidentiary diffulties are at issue; but above all of course the interests of the claimant in being given sufficient opportunity to enforce his rights play decisive roles[695]. The last aspect is formulated by *F. Bydlinski*[696] as a legal principle to the effect that prescription can only begin when the claimant is in fact able to exercise the relevant right[697].

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687 More details in Basic Questions I, no 9/1 FN 3.

688 *Zimmermann,* »... ut sit finis litium«: Grundlinien eines modernen Verjährungsrechts auf rechtsvergleichender Grundlage, JZ 2000, 857.

689 System und Prinzipien 167 ff.

690 *Grothe* in MünchKomm, BGB I[6] Vor § 194 no 7; *Patti,* Rechtssicherheit und Gerechtigkeit im Verjährungsrecht des DCFR, ZEuP 2010, 58; *Piekenbrock,* Befristung, Verjährung, Verschweigung und Verwirkung (2006) 317 f.

691 Cf also *Peters/Zimmermann,* Verjährungsfristen, in: Bundesminister der Justiz (ed), Gutachten und Vorschläge zur Überarbeitung des Schuldrechts I (1981) 187 ff; *Gilead,* Economic Analysis of Prescription in Tort Law, in: Koziol/Steininger (eds), European Tort Law 2007, 112 ff.

692 Verjährung im österreichischen Schadenersatzrecht de lege lata und de lege ferenda, Liber Amicorum Pierre Widmer (2003) 174.

693 *Zimmermann,* JZ 2000, 857; *idem,* Comparative Foundations of a European Law of Set-Off and Prescription 76 ff.

694 *Zimmermann/Kleinschmidt* in: Koziol/Steininger, European Tort Law 2007, 31.

695 See on this recently *Vollmaier,* Verjährung und Verfall (2009) 50 ff with additional references.

696 System und Prinzipien 169.

697 This idea is now also underlined by the European Court on Human Rights in its decision *Howald Moor et autres c. Suisse,* 11. 3. 2014, nos 52067/10 and 41072/11, §§ 71 and 74.

For *Grothe*[698], it is absolutely essential for the removal of rights with the passing of time to be admissible under constitutional law, since rights to claims also have the nature of property under art 14 of the Basic Law in Germany *(Grundgesetz)* and the legislator must thus have regard in an appropriate fashion to the suit of the obligee. According to him, this means that the obligee must be given a *fair chance* to *assert his claim.* He must be given the opportunity to recognise that his claim exists, examine its validity, collect evidence and prepare to enforce it in court. This postulate can be met either by taking actual or possible identification as the starting point or by providing for sufficiently long objective periods. Finally, he emphasises that in all cases prescription of the claim before it even arises is irreconcilable with constitutional law principles. **8/336**

This viewpoint can certainly be supported by private law and, in particular, law of damages' values. The arguments by those who defend prescription before claims have arisen often create the impression that the priority is not the protection of the victim otherwise entitled to compensation but of the responsible injuring party: they cite the necessity to protect the obligor against evidentiary difficulties, to protect his entitlement to expect at some point that there will be closure to an incident, the public interest in the speedy resolution of legal disputes as well as the goal of preventing legal disputes precisely by means of the rules on prescription; only at the end is the need to keep the justified suit of the creditor in mind also mentioned[699]. The same tendency can be seen in the statement that the law should only interfere with the term of the prescription period to the extent that this seems absolutely necessary in order to protect the creditor[700]. **8/337**

It cannot by any means be denied that this brings very important aspects into play; however, it seems to me that it leaves one very fundamental idea practically unconsidered: as argued in Basic Questions I[701], it must be assumed that prescription ensues on the basis of the obligee's failure to take timely action to pursue an enforceable claim. The failure to act in good time and thus, the possibility of blameworthy *misconduct* on the part of the compensable claimant are, however, not possible until after the damage has arisen since previous to this there is no way for him to assert the claim. If there are no such blameworthy aspects to be lain at the victim's door, not even an objective failure to collect his claim, there can be no objective justification for robbing the victim of his claims merely because of the passing of time and for relieving the injuring party of liability. **8/338**

The starting point for the resolution of the problem must be the consideration that awarding a compensation claim hinges on it being more reasonable for **8/339**

698 MünchKomm, BGB I[6] Vor § 194 no 9.
699 See *Zimmermann/Kleinschmidt* in: Koziol/Steininger, European Tort Law 2007, 31.
700 See *Zimmermann/Kleinschmidt* in: Koziol/Steininger, European Tort Law 2007, 32 f.
701 Basic Questions I, no 9/21.

the injuring party to ultimately bear the burden of the damage when the grounds for imputation are fulfilled; ie the *victim* appears more *worthy of protection* than the injuring party. There is, however, no reason why the victim should seem less worthy of protection and have his claim refused, when for instance due to slow-working chemical substances or radiation, the damage only occurs more than 30 years after the action attributable to the injuring party. Why should such victims remain without any compensation for their loss of earnings, the medical expenses and their pain? With all due respect for the interests of the injuring party in being entitled to consider past events over at some point, the underlying value judgement established by the legal system must be kept in mind too, which holds that, when all grounds for imputation are fulfilled, the victim is recognised as the more worthy of protection than the injuring party. The exclusive consideration of the interests of the responsible injuring party in the prescription issue is extremely one-sided; it reverses the value established for the law of damages in this respect and thus, does not appear very reasonable. The party who may have been exposed to the effects of an event that would trigger another's liability cannot, after all, demand that the damage not be allowed to ensue anymore after a certain time has passed, since ultimately he must be allowed at some point not to have to anticipate damage any longer. Nature does not allow itself to be dictated to as regards times within which damage must have manifested. Why, however, should the responsible injuring party's ability to plan ahead be favoured with the certainty of not being exposed to any burden in such respect although the victim cannot obtain any such security that there will be no harm? Why, in particular, should this be the case given that usually the injuring party is ultimately more likely to know of his own wrongful and culpable conduct or other event for which he is responsible, making the eventual occurrence of damage much more likely to be foreseeable to him than to the later victim? Accordingly, the injuring party actually deserves much less protection of his expectations than the victim. Above all, however: why should the security interest of the injuring party who acted in a wrongful and culpable manner or who is strictly liable have priority over the security interest of the victim, although it is the injuring party in particular who is responsible for bringing about the unhappy situation? This fundamental aspect was acknowledged, at least by the German legislator, in 2013, albeit to a very limited extent. The new version of § 197 para 1 no 1 of the German Civil Code (BGB) in connection with § 200 BGB provides that compensation claims that are based on intentional injury to life, body, health, liberty or sexual self-determination are only prescribed 30 years after the claim has arisen and thus, only after the damage has occurred. Unfortunately, this still has no regard to the fact that in the case of gross or slight negligence on the part of the injuring party, there is still no apparent reason why his interests should be preferred over the interests of the innocent victim.

The various arguments that seek to point out the need to protect the liable injuring party cannot really counter the illogicality of *reversing the fundamental value* established under the *law of damages.* While it is true that the evidentiary situation worsens for the injuring party over the passing of a long period of time, it must not be forgotten that this problem is primarily imputable to the injuring party himself, as he carried out the actions giving rise to liability and thus, is accountable for the damage. Moreover, it must be considered that the victim often also has evidentiary difficulties after a longer period of time, as the sequence of the damaging event is often hardly provable by then. In any case the argument regarding evidentiary difficulties does not allow any greater worthiness for protection on the part of the injuring party to be deduced than on the part of victim. Besides this, it must be noted that especially when it comes to conduct that slowly causes damage, scientific progress can certainly make it easier for the injuring party to defend himself[702]. **8/340**

Especially in the case of very long latent times, it can hardly be argued that the passing of time entitles the injuring party to *assume* that an event may be regarded as over and done with. It must be taken into account that after all – as mentioned above – it is the injuring party, who in a manner imputable to himself brought about a cause of damage likely to remain latent for a long period of time, who can far more reasonably be expected to reckon with the occurrence of damage and thus, with the burden of compensation claims than it is for the victim, who possibly knows nothing about such event or at least has no idea that he has been harmfully affected by such event. Hence, the value judgement is quite clearly that it is by far the victim who must be safeguarded against ultimately having to bear completely unanticipated damage rather than the culpable injuring party, who after all knows of the damaging event. **8/341**

It is certainly true that it is in the public interest to *decide legal disputes without delay.* It is, however, the injuring party who, in a manner imputable to himself, has brought about a situation where this is no longer possible when it comes to damage that remains latent for a long period of time. Accordingly, it is not clear why this argument should be brought at the expense of the victim, who perhaps still has no idea of his future damage. The injuring party who wishes to have security could also bring this about by declaring his liability for the damage arising from the damaging event imputable to him. The future victim, who has no idea of either the damaging event or his own damage, has no means to prevent his future surprise when the damage manifests. **8/342**

Zimmermann/Kleinschmidt[703]*,* however, present a highly interesting argument beyond all this for why prescription before the occurrence of the damage and thus, **8/343**

702 See the reference in *Green/Cardi,* USA no 6/202.
703 In: Koziol/Steininger, European Tort Law 2007, 53 ff.

prior to the compensation claim arising, does not unreasonably burden the victim at least in the case of personal injury in some legal systems: they rightly point out that cases of damage that remains latent for a long period of time have been much less noteworthy in countries where there is a generous *social security law,* for example in many European countries. It is of course completely true that such alternative compensation systems make it easier to bear the loss of a compensation claim due to prescription; the loss of the claim in this respect ultimately does not affect the victim but only the social security institution which may have had recourse claims. Nonetheless, it must be pointed out that while social security law does assuage the burden somewhat for the victim, it can by no means fully balance out the loss of the compensation claim due to prescription since social security does not fully cover a whole series of types of damage, in particular non-pecuniary harm and damage to things. As regards the remaining damage not covered by social security, however, all arguments in favour of protecting the victim and against protecting the injuring party instead remain valid. Therefore, this argument would only be fully persuasive if social security completely sidelined the law of damages. This will not be the case in the foreseeable future as regards damage to things and, moreover, even then the question of why the general public and not the responsible injuring party should ultimately have to bear the damage due to prescription of the social security institution's rights of recourse would arise. From that point of view, the problem of prescription would remain completely unsolved.

8/344 It is far easier to justify approaches, examples being the French and Italian ones, that completely refrain from any long, objective period and always attach to knowledge of both the injuring party's identity and damage[704].

8/345 The connection between the length of the prescription period and the commencement of the prescription period remains to be addressed. The German Civil Code has provided for the length of the period to be *differentiated according to the rank of the injured interest;* this seems very persuasive[705] as it takes into consideration an essential basic value established by the legal system. Thus, it is no wonder that this notion has also attained considerable significance in English law: the proposal of the English Law Commission in 2001 provides that asserting personal injury claims should not be subject to any special, long prescription pe-

704 *Zimmermann/Kleinschmidt,* Prescription: General Framework and Special Problems Concerning Damages Claims, in: Koziol/Steininger, European Tort Law 2007, 55 f.

705 For a distinction see also *Loser-Krogh,* Kritische Überlegungen zur Reform des privaten Haftpflichtrechts – Haftung aus Treu und Glauben, Verursachung und Verjährung, Zeitschrift für Schweizerisches Recht NF 122 II (2003) 204; *Mansel,* Die Reform des Verjährungsrechts, in: Ernst/Zimmermann (eds), Zivilrechtswissenschaft und Schuldrechtsreform (2001) 384; *Zimmermann/Kleinschmidt* in: Koziol/Steininger, European Tort Law 2007, 51 ff.

riod but only the usual, short prescription period which hinges on knowledge[706]. In the Netherlands, there is a corresponding development[707]. In the Austrian reform debate, this idea has therefore also been included: pure economic losses are removed from the thirty year prescription period in § 1489 para 1 of the Austrian Draft; a period of ten years will apply in this respect.

8/346 The German rule that provides for a ten-year period that only begins with the occurrence of the damage alongside the thirty-year period that runs from the time of the damaging event highlights how the length of the period is connected with the *point of time material for the beginning.* If the commencement of the period is tied to the occurrence of damage, there is at the least always an abstract possibility for the victim to assert his claim. If, on the other hand, the damaging event is the trigger for the period to begin, there is a risk that the claim will be prescribed before it even arises, thus depriving the victim even of the abstract possibility of asserting a compensation claim. In order to keep this risk to as tolerable a level as possible, very long prescription periods are provided: the interests of the victim are of course all the more massively impaired the shorter the period is, as then his chance – even abstract – of asserting his compensation claims applies in respect of an ever-decreasing amount of the damage.

8/347 Vice versa, the less significant the risks of unjustified claims for compensation against the defendant arising due to the passing of time, the longer the prescription period can be set. This risk can, in particular, be reduced by a complete reversal of the burden of proof in favour of the injuring party, as provided for in § 933a para 3 of the Austrian Civil Code (ABGB) for compensation claims based on the defective nature of a thing and consequential damage in this respect as well as in general the Austrian Draft in § 1489 para 2.

8/348 These considerations allow the deduction of the following *approaches to regulating* the issue: that a relatively *short prescription period* that starts with the time of the *knowledge* or constructive knowledge (obviousness) of damage and the identity of the liable party is largely undisputed and should be retained as appropriate. If the damage has already occurred and if the victim knows of both the damage and the injuring party's identity, ie the main prerequisites for a claim, the heavy accusation of having *failed to act in good time* (Säumigkeit) can at least objectively be levelled against him. The heavier the accusation of having failed to act in good time weighs, the less worthy of protection the victim appears and the more appropriate it is to take account of the interests of the injuring party, so that a short prescription period is appropriate.

706 *Zimmermann/Kleinschmidt* in: Koziol/Steininger, European Tort Law 2007, 53 f; cf also *B.A. Koch,* Liber Amicorum Pierre Widmer 197 ff.

707 *Zimmermann/Kleinschmidt* in: Koziol/Steininger, European Tort Law 2007, 54 f.

8/349 The objective, *long prescription period* should likewise also be structured according to the values expressed by the European legal systems. Pursuant to the general basic principles of prescription law, it may therefore – in contrast to widespread opinion – *not commence prior to the occurrence of the damage:* if the claim has not yet arisen, the accusation of having failed to act cannot be levelled even abstractly at the victim. Therefore, there is *no justification whatsoever* for imposing the sanction of loss of the claim upon the victim and thus benefitting the injuring party, who brought about the damage in a manner imputable to himself, by freeing him from the obligation. The balancing of interests seems to come out heavily against the responsible injuring party in this respect.

8/350 If the prescription period does not commence before the occurrence of the damage, an objective period shorter than 30 years would seem appropriate. In terms of the underlying values, however, a lot can be said for taking how *worthy of protection* the damaged legal goods are as a premise. When the highest ranking goods are injured, the long objective period of 30 years ought to be maintained or as an alternative – even on its own – a relatively short, subjective period stipulated; only in the case of impairment of minor interests, above all pure economic interests, should a shorter objective period of 10 years be provided.

8/351 Finally, the interests of the potentially liable party not to run into insoluble evidentiary difficulties due to the passing of time or not to be exposed to unjustified actions could be safeguarded by reversing the *burden of proof* at the expense of the claimant once half of the prescription period has expired. This simultaneously establishes an incentive for the prompt assertion of claims, as would be desirable in general.

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Publisher's note

This document is the complete, unaltered version of Helmut Koziol's »Basic Questions of Tort Law from a Germanic Perspective«. This is not an e-book! It is a PDF. While the software available for the creation of e-books may satisfy the needs of a novel, unfortunately it does not cater to the typographical needs of lengthy scientific texts with numerous heading levels, extensive footnotes and complex indexes based on marginal numbers. To date no solution has been found for an acceptable interplay between authors and publishers, appropriate for titles apart from bestseller-lists and their available resources.

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The starting point for this project on the »Basic Questions of Tort Law« was the book written by Helmut Koziol, the »Basic Questions of Tort Law from a Germanic Perspective« (Sramek Verlag, 2012), a volume which presented an introduction into the law of torts from a Germanic perspective. Colleagues from seven countries (O Moréteau, France; B Askeland, Norway; K Ludwichowska-Redo, Poland; A Menyhárd, Hungary; K Oliphant, England and the Commonwealth; M D Green/W J Cardi, USA; K Yamamoto, Japan) were then invited to give critical responses to the ideas presented in the 2012 volume. The comparative law conclusions then attempt to pick up on the ideas expressed in the legal systems examined and to make them amenable for debate on the further development of the legal systems and their harmonisation. Obviously, it was not possible to respond to all of the valuable thoughts contained in the country reports. Above all, the focus was on ideas that have not yet been discussed very often and also on providing impulses in relation to legal policies. It was fascinating that often the national responses to law of damages issues at first gave the impression of being less than appropriate but then in relation to basic ideas within the respective legal systems and in interplay with other legal institutions, for example social security law, they turned out to have good arguments in their favour. Moreover, there were sometimes additional features in yet other legal systems that supplied ideas for how to further develop a not-yet persuasive solution and which ultimately led to surprising, new basic concepts, which could deliver valuable ideas for the development and harmonisation of the European law of damages. Thus, it was possible to develop in the area of personal injuries a proposal for a new kind of interplay between the law of damages, liability insurance and social security, which could offer many benefits.

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